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PIERCING THE VEIL OF THE *AMOCO CADIZ* DECISION: JUDGE POSNER'S JURISDICTIONAL ANALYSIS RUNS AGROUND

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> I cannot but believe that if the training of lawyers led them habitually to consider more definitely and explicitly the social advantage on which the rules they lay down must be justified, they sometimes would hesitate where now they are confident, and see that really they were taking sides upon debatable and often burning questions.[1]
>
> —Oliver Wendell Holmes, 1897

> [T]o a great extent judicial decisions are "winners' history," for unless there is a dissenting opinion the decision is likely to state the facts and deploy the authorities in a one-sided fashion that cannot be detected without more digging than most observers will have the time or inclination to do.[2]
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> —Richard Posner, 1988

INTRODUCTION

The 1983 case of *In re Oil Spill by Amoco Cadiz*[3] ("*In re Amoco Cadiz*"), presented the Seventh Circuit Court of Appeals with two timely opportunities. One was the chance to rearticulate its personal jurisdiction calculus in light of two, then recent, Supreme Court decisions.[4] The other was to address certain novel jurisdictional issues which the case had produced.[5] Instead of delivering a thorough exposition of its personal jurisdictional framework and the case's resolution, however, the court, per Judge Posner, engaged in a form of judicial activism which ignored existing authority and distorted the case's issues.

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1. Holmes, *The Path of the Law,* 10 HARV. L. REV. 457, 467-68 (1897).

2. Posner, *The Jurisprudence of Skepticism,* 86 MICH. L. REV. 827, 874 (1988).

3. 699 F.2d 909 (7th Cir. 1983).

4. Insurance Corp. of Ireland v. Compaigne des Bauxites de Guinee, 456 U.S. 694 (1982); World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286 (1980). For a discussion of these cases and their jurisdictional themes, see *infra* notes 40 & 41 and accompanying text, and part III(C) of this Article.

5. *See infra* notes 40 & 41.

By employing ad hoc principles in the areas of corporate, contract, and procedural law, Judge Posner displayed a judicial method in which metaphor displaced analysis, contrivance supplanted disclosure, and discretion pre-empted authority. The purpose of this Article is to examine this method in order to reveal its spurious foundations. This examination, in turn, will expose the *In re Amoco Cadiz* decision for what it really was: an unwarranted exercise of judicial discretion, which discarded the issues of the case and the doctrines of the day in order to impose an unsupported legal theory.

In pursuing the above purpose, this Article will demonstrate the validity of, and the tensions between, the passages quoted at the outset. With respect to Justice Holmes's observation, this Article will argue that had Judge Posner "hesitated" long enough to consider the issues, perhaps he would have provided insight into those "burning" questions then before him. With respect to Judge Posner's statement, this Article will underscore its insight by demonstrating that Judge Posner himself—perhaps assuming the protection of a "winner's history"—crafted a one-sided decision which not only left those burning questions unresolved, but, through its application of unsupported legal theory, left them obscured as well.

This Article will first place the *In re Amoco Cadiz* decision in its factual and legal context, and then will examine the decision in light of Illinois precedent, federal due process standards and, most importantly, Judge Posner's own jurisprudential principles. Part I provides an overview of the litigation's development, while Part II presents the factual and procedural background to the dispute. Part III discusses the case's legal context through an examination of the Illinois Long-Arm Statute, the lower court's decision, and, finally, in personam due process as it existed at the time of the Seventh Circuit's decision. Part IV then looks at the decision itself and critiques the validity of the principles used by Judge Posner to reach his conclusion. Part V concludes the analysis by exposing the tensions produced in Judge Posner's jurisprudential scheme through his efforts to resolve the complex issues before him with the panacea of "judicial economy."

I. AN OVERVIEW TO THE *IN RE AMOCO CADIZ* LITIGATION AND ITS RELATIONSHIP TO JUDGE POSNER'S JURISPRUDENTIAL PHILOSOPHY

On March 16, 1978, while carrying a cargo of crude oil from the Middle East to Europe, the supertanker, Amoco Cadiz, suffered a failure of its steering system some 13 miles off the coast of Brittany, France. Despite salvage efforts by a German tugboat, the Amoco Cadiz grounded on the rocks off Portsall, France, and discharged her cargo. More than 200 tons of crude oil escaped from the vessel, polluting more than 200 miles of the French coastline.[6]

6. Brief for Appellees Conseil General Des Cotes du Nord at 2, *In re* Oil Spill by the Amoco Cadiz off the Coast of France on March 16, 1978, 699 F.2d 909 (7th Cir. 1983) (Nos. 82-1751 and 82-1943) [hereinafter *Brief for Appellees Conseil General Des Cotes du Nord*].

French claimants, ranging from the Republic of France itself to various governmental agencies, municipalities, businesses, and citizens brought suit in the Federal District Court for the Northern District of Illinois.[7] Those named as principal defendants were: Amoco Transport Company ("Amoco Transport"),[8] a Liberian corporation with its principal place of business in Hamilton, Bermuda and the owner of the tanker; Amoco International Oil Company ("AIOC"),[9] a Delaware corporation with its principal place of business in Chicago, Illinois, which served as Transport's agent;[10] Standard Oil Company of Indiana ("Standard Oil"),[11] the parent of AIOC which also had its principal place of business in Chicago, Illinois; and Astilleros Espanoles, S.A., ("Astilleros"),[12] the ship's builder, which was a Spanish corporation with its principal place of business in Madrid, Spain. The French filed suits for direct relief against each of these parties.[13]

The French claimants alleged that Standard Oil and its affiliates (hereinafter referred to collectively as the "Amoco parties") negligently constructed, maintained, and operated the tanker. The French also asserted that Astilleros negligently or defectively designed the tanker, and added a claim for breach of implied warranty.[14]

Pursuant to Rules 13 and 14 of the Federal Rules of Civil Procedure, the Amoco parties filed cross-party and third-party claims, respectively, against Astilleros.[15] They alleged that the Spanish corporation was primarily respon-

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7. Memorandum Opinion and Final Judgment Order on the Issue of Liability at 2, *In re* Oil Spill by the Amoco Cadiz off the Coast of France on March 16, 1978 (N.D. Ill., April 18, 1984) [hereinafter *Liability Opinion*]. In addition to lawsuits filed by the Republic of France, actions for oil pollution damages were also brought by the French administrative department of Finistere and Conseil General Des Cotes du Nord, numerous municipalities, and a number of French individuals, businesses and associations.

8. *Liability Opinion, supra* note 7, at 1.

9. *Id.* at 2.

10. *Id.* at 82. AIOC served as Amoco Tankers' agent throughout the negotiations concerning the Amoco Cadiz. However, there was no written consulting agreement or agency agreement between AIOC and Amoco Tankers at any time. Amoco Tankers sold the Amoco Cadiz to Amoco Transport sometime before the oil spill occurred.

11. *Id.* at 2-3.

12. *Id.* at 1.

13. The French suits filed were: Republic of France v. Standard Oil Co. (Indiana); Republic of France v. Astilleros Espanoles, S.A.; Conseil General Des Cotes du Nord v. Standard Oil Co. (Indiana), Astilleros Espanoles, S.A., Amoco International Oil Co., Claude Phillips, and American Bureau of Shipping, (No. 79 C 3761) (1971); (Cross-claim) Standard Oil Co. (Indiana), AIOC, and Claude Phillips v. Astilleros Espanoles, S.A. (1979).

14. *Liability Opinion, supra* note 7, at 5.

15. FED. R. CIV. P. 13(g), 14(a). The Amoco parties also requested that the French plaintiffs recover directly from Astilleros under Rule 14(c). *Liability Opinion, supra* note 7, at 5.

It also should be noted that prior to the bringing of the French claims, Amoco Transport, Standard Oil, AIOC, and Claude Phillips filed a complaint (No. 78 C 3693) in admiralty for exoneration from or limitation of liability concerning claims resulting from the grounding of the Amoco Cadiz. Each party then filed a third-party complaint against Astilleros for contribution or indemnification. Shortly thereafter, all of these third-party complaints except for that of Amoco Transport were dismissed. For a more detailed account of these actions. *See infra* part II.

sible for the accident due to its negligent design and manufacture of the tanker. The Amoco parties sought indemnity or contribution for any damages which they might be ordered to pay the French claimants.[16]

Astilleros moved to dismiss these actions on the ground that the district court lacked personal jurisdiction.[17] Both the French and Amoco groups contested, stating that Astilleros had sufficient contacts with Illinois to satisfy the requirements of the state's Long-Arm Statute. They pointed, in particular, to section 17(1)(a) of the Illinois Revised Statutes,[18] (the "Long- Arm Statute") which stated that a nonresident who "transacts any business" in Illinois is amenable to suit there for causes of action "arising from" these in-state activities.[19] The Amoco parties and the French claimants claimed that, even though Astilleros had negotiated with an entity which was not a party to the litigation, the company's negotiation and execution in Chicago of the contract to build the Amoco Cadiz was sufficient to satisfy the Illinois statute.[20]

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16. *Liability Opinion, supra* note 7, at 5.

17. Astilleros filed its motions to dismiss in the following sequence:
1) June 8, 1979—Notice of Motion of Astilleros Espanoles, S.A. to Dismiss Third-Party Complaint of Amoco Transport Co.;
2) November 26, 1979—Notice of and Motion of Astilleros Espanoles, S.A. to Dismiss Cross-Claim and Third-Party Claim of Standard Oil Co., Amoco International, and Claude Phillips;
3) March 3, 1980—Motion of Astilleros, S.A. to Dismiss Third-Party Claim of Standard Oil Co. (Indiana).

Astilleros also sought to dismiss the third party claims of Standard Oil for lack of subject matter jurisdiction and for *forum non conviens.* These subjects, however, are not relevant to this article.

18. ILL. REV. STAT. ch. 110, § 17(1)(a) (1978), *repealed by* Illinois Code of Civil Procedure, ILL. REV. STAT. ch. 110, para. 2-209(a)(1) (1982), *amended by* ILL. REV. STAT. ch. 110, para. 2-209(c) (1987).

19. Although the sections of the Illinois Long-Arm Statute have been renumbered since the trial began, the identical language has been retained. Section 17 provides, in pertinent part:

> Act submitting to jurisdiction—Process
>
> (1) Any person, whether or not a citizen or resident of this State, who in person or through an agent does any of the acts hereinafter enumerated, thereby submits such person, and, if an individual, his or her personal representative, to the jurisdiction of the courts of this State as to any cause of action arising from the doing of any of such acts:
>
> (a) The transaction of any business within this State;
>
> (b) The commission of a tortious act within this State;
>
> . . . .
>
> (3) Only causes of action arising from acts enumerated herein may be asserted against a defendant in an action in which jurisdiction over him or her is based upon this Section.

ILL. REV. STAT. ch. 110 § 17 (1977) (codified as amended at ILL. REV. STAT. ch. 110, para. 2-209(a)(1), (a)(2), (d) (1987)).

20. The other party to the contract was Amoco Tankers, a yet to be formed Liberian corporation which subsequently sold the Amoco Cadiz to Amoco Transport. Amoco Tankers was not the ship's owner at the time of the spill. *See In re* Oil Spill by Amoco Cadiz off the Coast of France on March 16, 1978, 491 F. Supp. 170, 171-72 (N.D. Ill. 1979) [hereinafter *In re Oil Spill*].

The district court, per Judge McGarr, found that Astilleros was subject to Illinois jurisdiction with respect to all of the claims brought against it.[21] On appeal, Judge Posner, writing for the Seventh Circuit, affirmed this finding.[22] One of the primary questions both the district and circuit courts had to decide in order to resolve the jurisdictional dispute was whether, in a product liability suit, foreign plaintiffs could bring an action against an alien defendant for an out-of-state injury caused by a product designed, manufactured, sold, and used outside of Illinois. In order to answer this question in the affirmative, the respective courts either had to interpret the "arising from" clause of Illinois' Long-Arm Statute liberally, or construe the facts of the case selectively. While Judge McGarr opted for the former method, Judge Posner followed the latter.[23]

For Judge Posner, the question of whether the individual indemnity claims "arise from" the negotiations, and thus, fit within the long arm statute was immaterial. Rather, what was important to Judge Posner was that the Amoco parties involved in the dispute actually constituted one entity, and this entity had contracted with Astilleros in Chicago. Judge Posner further found—implicitly dismissing the contract provision exonerating Astilleros from any consequential damages which arose from faulty construction[24]—that, had the

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21. *Id.* at 174. For a more detailed discussion of the sequence by which Judge McGarr dismissed all of Astilleros' motions, see *infra* part II.

22. *In re* Oil Spill by Amoco Cadiz off the Coast of France on March 16, 1978, 699 F.2d 909 (7th Cir. 1983) [hereinafter *In re Amoco Cadiz*].

23. In his opinion discussing Astilleros' motion to dismiss Amoco Transport's action, Judge McGarr read the "arising from" clause to require only that Amoco Transport's claim "lie in the wake" of Astilleros' in-state activities. Without discussing the scope of this wake, Judge McGarr concluded that an indemnity claim arising from a ship's breakdown lay in the wake of the contract negotiations for that ship even though the indemnity claimant was not a party to the contract in question. Judge McGarr subsequently used this reasoning to uphold jurisdiction for the French claims, as well as for the actions brought by the other Amoco parties. 491 F. Supp. at 174.

Although no federal or Illinois state court has tried to impose upon this particular metaphor any concrete parameters, these same courts are guided in their jurisdictional analyses by a number of considerations. They include: the nature of the business transaction, the applicability of Illinois law, the contemplation of the parties, and the likelihood that witnesses would be found in Illinois, Mergenthaler Linotype Co. v. Leonard Storch Enters., Inc., 66 Ill. App. 3d 789, 797, 383 N.E.2d 1379, 1385 (1st Dist. 1978), as well as who initiated the agreement, where the contract was formed, and where it was to be performed. Empress Int'l, Ltd. v. Riverside Seafoods, Inc., 112 Ill. App. 3d 149, 153, 445 N.E.2d 371, 373-74 (1st Dist. 1983).
The troubling aspect to Judge McGarr's opinion was that he did not discuss any of these factors. For further discussion, see *infra* parts II and III(B).

24. Contract dated July 31, 1970 for the construction of a 230,000 Metric Ton Oil Tanker between Astilleros Espanoles, S.A. and Amoco Tankers Company, Art. IX, para. 3 [hereinafter *Amoco Cadiz Contract*]. Paragraph 3 stated in part:

> The builder shall be under no obligation with respect to defects discovered after the expiration of guarantees specified above. At no time shall the Builder be under any obligation for any consequential damages occasioned by any defects or for any loss of time in operating or repairing the vessel, or both, caused by any defects.

Id.

parties foreseen the disaster,[25] Astilleros would have guaranteed indemnity, for it was the lowest cost avoider of the disaster's burden.[26] Judge Posner thus further characterized Amoco's mono-party indemnity claim as "quasi-contractual,"[27] for although the clause that was putatively breached was not in the contract,[28] it would have been had the parties been clairvoyant. He then reasoned that such a "quasi-contractual" claim "arose from" Astilleros' execution of the contract in Chicago.[29]

The French claims, however, were clearly not contractual in nature, and thus quasi-contract was unavailable. Judge Posner reasoned, however, that it would "be odd if, though the French can sue Amoco in Chicago and Amoco can bring in Astilleros as a third-party defendant here, the French must go to Spain to sue Astilleros."[30] He therefore decided—without citing a single case for support, Illinois or otherwise—that "considerations of judicial economy"[31] made Chicago the proper forum for all parties concerned. Thus, for all of its complexity, the *In re Amoco Cadiz* dispute was resolved through: 1) the exercise of unsolicited judicial veil piercing; 2) the counterfactual application of Judge Posner's implied consent theory;[32] and,

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25. Although the parties did not foresee the March 16, 1978 oil spill, they did provide that the Amoco signatory would shoulder the risk of any consequential damages arising from defects in the ship. *Id.* This fact discredits Judge Posner's conjectural analysis, for the parties did agree beforehand on this matter of risk allocation. For further discussion of this point, see *infra* part IV(B).

26. *In re Amoco Cadiz*, 699 F.2d at 915.

27. *Id.* Wrote Judge Posner: "This [wealth-maximization] reasoning shows that Amoco's claim for indemnity, though not strictly contractual, has the form of a contractual argument—enough so that it can be said to 'arise from' the negotiation and signing of the shipbuilding contract." *Id.*

28. As stated, however, a clause addressing liability was already part of the contract. *See supra* note 24.

29. 699 F.2d at 915.

30. *Id.* at 917. This reasoning rests on the specious principle that, in an action between the principal plaintiff and a third-party defendant to a lawsuit, the principal plaintiff need not establish the court's personal jurisdiction over the third-party defendant for that claim if the court already has found personal jurisdiction over him in the third-party plaintiff's action. Such a concept of ancillary personal jurisdiction had long been discarded by the federal courts. *See, e.g.*, James Talcott, Inc. v. Allahabad Bank, 444 F.2d 451, 464-65 n.11 (5th Cir.), *cert. denied sub. nom.*, City Trade & Indus. v. Allahabad Bank, 404 U.S. 940 (1971).

31. 699 F.2d at 917.

32. Judge Posner fully develops this theory in Posner, *The Ethical and Political Basis and the Efficiency Norm of Common Law Adjudication*, 8 HOFSTRA L. REV. 487 (1980). In his Article, Judge Posner presents the view that the notion of wealth maximization is a proper objective in guiding common law adjudication. He justifies this principle by arguing that those affected by its exercise either had consented to its application, or would have consented had they been asked. Judge Posner thus articulates a theory of wealth maximization based largely on the concept of implied consent.

> If there is no reliable mechanism for eliciting express consent, it follows, not that we must abandon the principle of consent, but rather that we should look for implied consent . . . This procedure resembles a judges's imputing the intent of the parties to a contract that fails to provide expressly for some contingency.

Id. at 494.

3) the use of the talismanic jurisdictional principle of "judicial economy."

Although Judge Posner's analysis affirmed the result of the district court's decision, it arguably reversed the district court with respect to that court's reasoning. Moreover, the divergence in the logic of the two courts, in light of the expansiveness of the conclusion reached, suggests that perhaps the wrong decision was made.

Notwithstanding this consideration, the purpose of this Article is not to argue that this case was decided incorrectly. Rather, its purpose is to demonstrate that the case was decided improperly, not only in light of Illinois precedent and due process considerations, but also—and perhaps most significantly—with respect to Judge Posner's own jurisprudential norms.[33] The focus, in other words, is not on the legitimacy of the conclusion reached by the Seventh Circuit, but rather on the principles employed by that court in arriving at its decision.[34]

As mentioned above, one of these principles was the consideration of judicial economy. Judge Posner, in his scholarly writings, has pointed often to this factor as an important component of a judge's decisional calculus when higher authority does not provide a resolution: "[When] the answer is not dictated by precedent, judicial economy will inevitably, and justifiably, be one of the weights that the judge puts in the *balance* in making his decision. And it will be a heavier weight the heavier the caseload is."[35]

This statement, perhaps ironically, points to the crucial flaw of the *In re Amoco Cadiz* decision: that instead of being a factor in the jurisdictional *balance,* Judge Posner used the principle of judicial economy to justify his activist theories, which in turn preempted a discussion of the factors which

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33. In this regard, Judge Posner's own insights help to explain the focus of this Article.

> It is easy in the indeterminate case, but also hollow, to show that the court failed to prove the correctness of its result. The demonstration demonstrates only what is obvious, and also and by the same token does not establish that the contrary result would have been correct. The opinion can of course be criticized for ignoring opposing arguments, for misrepresenting precedent, for concealing the grounds of decision, and for all the other sins to which judicial flesh is heir.

Posner, *supra* note 2, at 865-66.

34. This Article argues that the *In re Amoco Cadiz* decision was flawed because the principles upon which the decision was based conflicted with the established legal doctrines of their respective fields. Moreover, in articulating these principles, Judge Posner did not pause to explain why he was abandoning precedent in favor of these norms. Judge Posner therefore exposed the parties to a method of resolution based almost entirely on unrestrained judicial discretion. Regardless of the outcome itself, then, the decision was unfair to the parties—at the minimum—by its failure to explain why the established doctrines were not applicable to the dispute at hand.

Writes one commentator: "Precedents define the themes around which the debates regarding legal doctrine must take place, and conscientiousness in adjudication—respect for the parties' rights—requires analyzing and deciding a particular case within the limits set by those themes. It is thus that we can have rights without right answers and rule of law without myth." Greenstein, *The Nature of Legal Argument: The Personal Jurisdiction Paradigm,* 38 HASTINGS L.J. 855, 887 (1987).

35. R. POSNER, THE FEDERAL COURTS: CRISIS AND REFORM 208 (1985) (emphasis added).

should have composed the jurisdictional inquiry.[36] In addition, by limiting his analysis to this principle, Judge Posner bypassed the opportunity to coordinate the revised, yet entangled, jurisdictional themes enumerated in the then recent Supreme Court cases of *World-Wide Volkswagen Corp. v. Woodson*[37] and *Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinee*[38] as they applied to the facts of *In re Amoco Cadiz*.[39] Some of these themes, moreover, would later be addressed by the Supreme Court in cases possessing factual similarities to *In re Amoco Cadiz*.[40]

The *In re Amoco Cadiz* decision, therefore, left in its wake not only the ignominy of judicial activism, but also the lament of lost opportunity.[41]

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36. For a discussion of those factors, see *infra* part III(C).

37. 444 U.S. 286 (1980).

38. 456 U.S. 694 (1982).

39. For a discussion of these themes, *see infra* part III(C).

40. With respect to *Insurance Corp. of Ireland's* emphasis on the defendant's "individual liberty interest," 456 U.S. at 702, Judge Posner had the chance to address the question of whether, in an action alleged to have "arisen out of" defendant's contacts, that interest should be accorded more weight when the nonresident defendant is an alien. It was not until Asahi Metal Indus. v. Superior Court of Calif., Solano County, 480 U.S. 102 (1987), that the Court discussed the weight to be given a defendant's alien status in a specific jurisdiction context (that is, the jurisdictional context depends on whether the suit in which the cause of action is asserted "arises out of or relates to" defendant's in-state conduct). *See* Helicopteros Nacionales De Colombia, S.A. v. Hall, 466 U.S. 408, 414 nn.8-9 (1984). *Asahi* involved an indemnity action brought by an alien plaintiff against an alien defendant. In denying the exercise of jurisdiction over the defendant, the Court stated: "The unique burdens placed upon one who must defend oneself in a foreign legal system should have significant weight in assessing the reasonableness of stretching the long arm of personal jurisdiction over national borders." 480 U.S. at 119.

Further, with respect to *World-Wide Volkswagen's* discussion of a defendant's reasonable foreseeability of suit in the forum, Judge Posner had the opportunity to discuss the import of choice-of-law and forum selection provisions in determining whether a defendant could reasonably anticipate suit in the forum. 444 U.S. at 295-97. The Supreme Court, in Burger King Corp. v. Rudzewicz, 471 U.S. 462 (1985), intimated that such contract provisions, in light of the accompanying circumstances, could provide insight into the defendant's expectations. "Nothing in our cases . . . suggests that a choice-of-law *provision* should be ignored in considering whether a defendant has 'purposely invoked the benefits and protections of a State's laws' for jurisdictional purposes." *Id.* at 482 (emphasis in original).

41. One of these questions, left open by the Supreme Court in *Helicopteros*, is whether a defendant's contacts with the forum should be given less weight when the cause of action relates to them but does not arise out of them. The Court stated:

> [W]e decline to reach the questions (1) whether the terms "arising out of" and "relate to" describe different connections between a cause of action and a defendant's contacts with the forum, and (2) what sort of tie between a cause of action and a defendant's contacts with a forum is necessary to a determination that either connection exists. Nor do we reach the question whether, if the two types of relationship differ, a forum's exercise of personal jurisdiction in a situation where the cause of action "relates to," but does not "arise out of," the defendant's contacts with the forum should be analyzed as an assertion of specific jurisdiction.

466 U.S at 415 n.10.

The *Helicopteros* dispute had a factual skeleton very similar to that of *In re Amoco Cadiz*.

II. Factual And Procedural Background

Astilleros Espanoles, S.A. is a Spanish corporation engaged in the business of ship construction and ship repair.[42] Its principal place of business and each of its five shipyards are located in Spain.[43] In 1969, AIOC and Astilleros signed contracts for the construction of two ships, which eventually became the Amoco Milford Haven and the Amoco Singapore.[44]

After negotiations with AIOC representatives in Madrid in early 1970, Astilleros issued a written proposal offering to build two additional tankers similar to the two previously agreed upon.[45] Negotiations relating to these ships, which later became the Amoco Cadiz and the Amoco Europa, took place in New York and Chicago.[46] In the last two weeks of July of 1970, negotiations for the Amoco Cadiz were concluded in Chicago.[47] These ne-

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Helicopteros involved an action in wrongful death by nonresident plaintiffs against a Colombian corporation arising from a helicopter crash in Peru. The suit was brought in Texas, where the defendant had contracted to provide its helicopter services for a pipeline construction project in Peru. *Helicopteros*, therefore, involved a claim in tort brought by nonresident plaintiffs against a nonresident defendant whose primary contact with the state was that of contract negotiations for services which later caused the tort in question. Moreover, like *In re Amoco Cadiz,* both the negligence and the injury occurred outside of the state. Also, the Texas long-arm statute, like Illinois', required that the cause of action "arise out of" defendant's in-state activities.

Unlike *In re Amoco Cadiz,* however, the plaintiffs in *Helicopteros* asserted jurisdiction under the doctrine of general jurisdiction—that the cause of action does not arise out of or relate to the defendant's state contacts but, rather, that the defendant has sufficient contacts with the state to assert jurisdiction over him for any cause of action whatsoever.

Though the specific/general distinction had not yet been introduced into the jurisdictional framework at the time of *In re Amoco Cadiz,* Judge Posner did have the opportunity to signal the difficulty in applying a statute mandating that the cause of action "arise from" defendant's contacts to a situation where those contacts at best only related to the action.

Another question still left unresolved is whether a defendant who purposefully conducts business in the forum state through contract may defeat jurisdiction by claiming that he did not reasonably anticipate suit there by virtue of the contract's choice-of-law and forum selection clauses. Language in *Burger King* would suggest that he could. "[M]inimum requirements inherent in the concept of 'fair play and substantial justice' may defeat the reasonableness of jurisdiction even if the defendant has purposefully engaged in forum activities." 471 U.S. at 477-78. However, no definitive statement concerning the "reasonableness" of relying on such provisions has been articulated.

42. *In re Oil Spill,* 491 F. Supp. at 171.

43. *Id.*

44. *Id.* In the late 1960's, the vice president of AIOC contacted Astilleros regarding the possibility of having Astilleros construct four ships for Amoco. Before any contract negotiations began, AIOC representatives visited Astilleros in Spain to determine whether the Spanish corporation possessed the capability to design and manufacture tankers of the size AIOC desired. AIOC subsequently selected Astilleros as the shipbuilder it would use. *Liability Opinion, supra* note 7, at 8-10.

45. *Liability Opinion, supra* note 7, at 77.

46. *Id.* at 10.

47. Brief for Appellees Amoco Transport Co., Amoco Int'l. Oil Co., Standard Oil Co. (Indiana) and Claude Phillips at 5, *In re Amoco Cadiz,* 699 F.2d 909 (7th Cir. 1983) (Nos. 82-1751 and 82-1943) [hereinafter *Brief for Appellees Amoco Parties*].

gotiations were between Amoco Tankers Corporation ("Amoco Tankers"), a yet to be formed Liberian corporation, and Astilleros.[48] An employee of AIOC acted on behalf of Amoco Tankers during these talks.[49]

The contract for the Amoco Cadiz was signed by Astilleros and Amoco Tankers on July 31, 1970.[50] Though executed in Chicago, the contract explicitly provided that it would not become effective until Amoco Tankers was organized under the laws of Liberia and until its board of directors had adopted, ratified, and confirmed the contract.[51] On the same day, AIOC and Astilleros also signed the specifications contract for the Amoco Cadiz, a one page letter describing the general layout and equipment for the ship.[52] No evidence was offered at trial that these specifications were negotiated or prepared in Illinois.[53]

The construction contract between Astilleros and Amoco Tankers was a 40 page printed document. Provisions relevant to the subsequent litigation included: a statement that the manufacture, sale, and delivery of the ship would occur in Cadiz, Spain, and that the ship would be registered under the Liberian flag;[54] a declaration that Astilleros would be under no obligation "for any consequential damages occasioned by any defect" due to faulty design or manufacture;[55] a forum selection clause providing that disputes arising under or by virtue of the contract were to be submitted to arbitration in London, England;[56] and a choice of law provision that the contract was to be governed by the laws of England.[57] From 1970 to 1974, Astilleros designed and constructed the Amoco Cadiz at its shipyard in Cadiz, Spain. The steering gear system for the ship,[58] referred to frequently in the litigation, was designed by Fabrica de Manises, one of Astilleros' plants in Spain, and was built by Fabrica de San Carlos, S.A., a Spanish corporation unrelated to Astilleros.[59] The parts used in construction of the steering gear, with

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48. *In re Oil Spill,* 491 F. Supp. at 171.

49. Brief for Appellant Astilleros Espanoles, S.A. at 7, *In re Amoco Cadiz,* 699 F.2d 909 (7th Cir. 1983) (Nos. 82-1751 and 82-1943) [hereinafter *Brief for Appellant Astilleros Espanoles, S.A.*].

50. *Id.*

51. *Amoco Cadiz Contract, supra* note 24, Art. XIX, para. 4.

52. *See Liability Opinion, supra* note 7, at 10-11.

53. Reply Brief of Appellant Astilleros Espanoles, S.A. at 3, *In re Amoco Cadiz,* 699 F.2d 909 (7th Cir. 1983) (Nos. 82-1751 and 82-1943) [hereinafter *Reply Brief of Appellant Astilleros Espanoles, S.A.*].

54. *Amoco Cadiz Contract, supra* note 24, Introduction.

55. *Id.* Art. IX, para. 3.

56. *Id.* Art. XIII, para. 2.

57. *Id.* Art. XIII, para. 5.

58. Liability was sought against Astilleros under theories of negligence in the design, testing, and construction of the Amoco Cadiz and her steering system. *See In re Oil Spill,* 471 F. Supp. at 473.

59. Affidavit of Eduardo Martinez, Director of Legal Services for Astilleros Espanoles, S.A., para. 8-9, *reprinted in* Appendix Supplement by Appellant Astilleros Espanoles, S.A. at 44-45, *In re Amoco Cadiz,* 699 F.2d 909 (7th Cir. 1983) (Nos. 82-1751 and 82-1943) [hereinafter *Appendix*].

certain exceptions for pumps and electrical equipment imported from Germany, were fabricated, manufactured, and assembled in Spain.[60] The steering gear system was installed in the Amoco Cadiz in Spain.[61] Moreover, almost without exception, the native language of the naval architects, design engineers, draftsmen, and mechanics who worked on the Amoco Cadiz was Spanish.[62] Also, most of the working documents and reference materials used in the ship's construction were written in Spanish.[63]

In May of 1974, Astilleros sold and delivered the Amoco Cadiz to Amoco Tankers in Cadiz, Spain. Amoco Tankers thereafter registered the ship with the government of the Republic of Liberia. The home port for the Amoco Cadiz was located at Monrovia, Liberia.[64]

During the four years in which the Amoco Cadiz was under construction, Astilleros visited Chicago only once with respect to matters concerning the ship. On June 13 through 15, 1972, Astilleros representatives met with agents of AIOC to discuss technical details for the Amoco Cadiz and her sister ships.[65] Subsequent to delivery but before the casualty, Astilleros representatives again visited Chicago to discuss guarantee matters relating to the Amoco Cadiz.[66] Astilleros' only other contacts with Chicago concerning the tanker were in the form of correspondence with Amoco Tankers, care of AIOC.[67]

Sometime between 1974 and the oil spill in 1978, Amoco Tankers sold the Amoco Cadiz to Amoco Transport Company. On the day of the casualty, Amoco Transport was the registered owner of the ship.[68]

The Amoco Cadiz ran aground on March 16, 1978. The casualty occurred in French territorial waters, thereby invoking the laws of France.[69]

After the spill took place, three principal suits were filed in the District Court for the Northern District of Illinois. On September 15, 1978, Amoco Transport, Standard Oil, AIOC, and Claude Phillips, an employee of AIOC who was involved in the ship's operation, filed a complaint in admiralty for exoneration from or limitation of liability concerning claims resulting from the grounding of the Amoco Cadiz.[70] On April 17, 1979, the court granted the French claimants' motion to dismiss Standard Oil, AIOC, and Claude Phillips from the proceedings.[71] The court sustained this motion on the

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60. *Appendix, supra* note 59, at 44-45.
61. *Id.* at 45.
62. *Id.* at 46.
63. *Id.*
64. *Liability Opinion, supra* note 7, at 1.
65. *Brief for Appellees Amoco Parties, supra* note 47, at 6.
66. *Id.*
67. *Id.*
68. *Liability Opinion, supra* note 7, at 1.
69. *Id.* at 99.
70. Case No. 78 C 3693. *See Appendix, supra* note 59, at iii. This complaint was brought pursuant to 46 U.S.C. §§ 181-96 (1982) (granting owners the affirmative right to sue to determine their liability).
71. *Liability Opinion, supra* note 7, at 4.

ground that only Amoco Transport, as the registered owner of the tanker, was entitled to maintain a limitation action.[72] The district court's dismissal of Standard Oil, AIOC, and Phillips was significant, because it indicated that the court viewed the Amoco parties as separate legal entities. On June 8, 1979, Astilleros moved to dismiss Amoco Transport's third-party limitation complaint, asserting lack of personal jurisdiction, lack of subject matter jurisdiction, and *forum non conveniens.*[73]

The second action was filed on August 28, 1979.[74] There, the Republic of France, the Department of Finistere, and various French communes filed a negligence action[75] against Standard Oil for damage allegedly resulting from spillage of crude oil from the Amoco Cadiz. Nothing in the record indicates that Standard Oil contested this action on the grounds that the French parties could only look to Amoco Transport for recovery and not to it.[76] Instead, on October 22, 1979, Standard Oil filed a third-party complaint against Astilleros for contribution or indemnification.[77] On March 3, 1980, Astilleros moved to dismiss Standard Oil's third party complaint, again asserting lack of personal jurisdiction, lack of subject matter jurisdiction, and *forum non conveniens.*[78]

The third suit, which commenced on September 11, 1979,[79] involved another group of French plaintiffs. The Conseil General Des Cotes du Nord, numerous French cities and towns, various union and trade associations, hotel owners, environmental groups, and commercial interests,[80] all located in France, filed an action[81] against Standard Oil, AIOC, Claude Phillips, the American Bureau of Shipping, and Astilleros.

The plaintiffs' complaint against Astilleros alleged negligence, breach of warranties, and strict liability in tort.[82] On October 16, 1979, Standard Oil, AIOC, and Phillips filed a cross-claim and third-party complaint against Astilleros for contribution or indemnification.[83] Once again, Astilleros moved for dismissal on the same grounds as asserted in the other suits.[84]

On December 26, 1979, the district court handed down its decision and denied Astilleros' June 8, 1979 motion to dismiss Amoco Transport's third-party complaint.[85] Based on the same opinion, the court later denied Astil-

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72. *Id.*

73. *Id.* at 5.

74. *Appendix, supra* note 59, at iv.

75. Case No. 79 C 3548.

76. The significance of the fact that Standard Oil passively allowed the French claimants to pierce its veil is discussed in *infra* part IV(A).

77. *Appendix, supra* note 59, at iv.

78. *Liability Opinion, supra* note 7, at 5.

79. *Appendix, supra* note 59, at v.

80. *Brief for Appellees Conseil General Des Cotes du Nord, supra* note 6, at 2.

81. Case No. 79 C 3761.

82. *Liability Opinion, supra* note 7, at 5.

83. *Appendix, supra* note 59, at v.

84. *Liability Opinion, supra* note 7, at 5.

85. *In re Amoco Cadiz,* 491 F. Supp. 170 (N.D. Ill. 1979).

leros' other two motions to dismiss.[86] In each instance, Astilleros subsequently declined to answer the complaints brought against it. On April 20, 1982, the court entered default judgments on the issue of liability in favor of third-party plaintiff Amoco Transport, cross-plaintiffs Standard Oil, AIOC, and Phillips, and third-party plaintiff Standard Oil.[87] A month later, the court entered a default judgment against Astilleros on the issue of liability in favor of the Cotes du Nord parties.[88] Astilleros appealed all default judgments rendered against it.

The only issue Astilleros raised on appeal was the district court's lack of personal jurisdiction over it. The Seventh Circuit affirmed the district court's decision.[89]

III. The Legal Setting For Judge Posner's Decision: The Illinois Long Arm Statute, The District Court Decision, And The Evolving Standards Of Due Process

The pivotal issue produced by the Amoco Cadiz litigation was whether the property damage and indemnity claims of the various parties "arose from" the negotiation and execution of the contract to build the ship. This question was complicated, however, by the multi-faceted nature of the suit. Standard Oil and AIOC were Chicago residents. The ship's owner, Amoco Transport, was Liberian. The principal plaintiffs were French residents, and the manufacturer was a Spanish resident.

Notwithstanding the factual complexity of the case, the district court found little difficulty in answering this question in light of the expansive interpretation it accorded section 17(1)(a)'s "arising from" requirement. Regardless of the claimants' domicile, reasoned the court, if the claim arose from a defective product, then a product liability claim would "arise from" the situs of the contract negotiations for the construction of that product. Such reasoning easily conferred jurisdiction over all of the claims. However, in finding jurisdiction, this analysis failed to take into account, and arguably breached, some of the inherent restrictions of 17(1)(a).

Such restrictions, as well as their functional implications, will be discussed in subpart (A) of this part. Subpart (B) will then examine the district court's handling of these limitations as they applied to the litigation.

Further, although the district court, in making its decision, did not have the benefit of the Supreme Court's rearticulation of the due process limitations on long-arm jurisdiction, an understanding of these principles is necessary in order to place the Seventh Circuit's decision in perspective.

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86. The district court denied Astilleros' motion to dismiss Standard Oil's claim (No. 79 C 3548) on June 9, 1980; it denied Astilleros' motion against the Amoco parties (No. 79 C 3761) on January 14, 1980. *See Appendix, supra* note 59, at v-vi.

87. *Appendix, supra* note 59, at vi.

88. *Id.* at vii.

89. *In re Amoco Cadiz,* 699 F.2d 909 (7th Cir. 1983).

Because Judge Posner did have the benefit of the Supreme Court's most recent refinements in the personal jurisdiction area, a complete assessment of his reasoning is not possible without a summary of these then recent precedents. Accordingly, subpart (C) of this part will conclude the background material by providing such a summary.

A. The Illinois Long-Arm Statute

The Illinois Long-Arm Statute provides that any nonresident who engages in any of the statute's enumerated acts within Illinois submits to the jurisdiction of Illinois courts for any cause of action arising from those acts.[90] Although the litigation in *In re Amoco Cadiz* revolved around only one section of the statute, two provisions were actually relevant: sections 17(1)(a) and (1)(b).[91] Section 17(1)(a) confers jurisdiction over a nonresident defendant who "transacts any business" within the state, while section 17(1)(b) covers the defendant who commits a tortious act within Illinois.

The difficulty in the *In re Amoco Cadiz* litigation was that the cause of action, negligent design and manufacture, and its related in-state activities, contract negotiations, fell in between the (1)(a) and (1)(b) paradigms. Although Astilleros had transacted business in Illinois, the claims brought against it were for its out-of-state tortious activities, not for its in-state contractual actions, nor for its out-of-state actions which breached a duty substantially created in Illinois.[92] In a jurisdictional context, therefore, this cause of action was a hybrid: a product liability suit based on the manufacturer's contractual, not tortious, contacts with the state.[93]

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90. ILL. REV. STAT. ch. 110 § 17 (1977) (codified as amended at ILL. REV. STAT. ch. 110, para. 2-209(a)(1), (a)(2), (d) (1987)).

91. *Id.*

92. For an example of a court finding the exercise of personal jurisdiction proper because the duty breached was substantially created in the forum state, see Scovill Mfg. Co. v. Dateline Elec. Co., 461 F.2d 897 (7th Cir. 1972) (although both plaintiff and defendant were nonresidents, performance of the contract took place out-of-state, and Illinois law did not govern, the court upheld jurisdiction in a breach-of-contract action because substantial negotiations for the contract took place in Illinois; in other words, the court upheld jurisdiction because the duty allegedly breached was substantially formed in Illinois).

93. The leading "hybrid" case in this area, insofar as it demonstrates the broad reach of 17(1)(a) in product liability cases, is Connelly v. Uniroyal, Inc., 75 Ill. 2d 393, 389 N.E.2d 155 (1979), *cert. denied and appeal dismissed,* 444 U.S. 1060 (1980). In *Connelly,* the plaintiff sued a Belgian tire-making company for personal injuries sustained when a tire manufactured by the defendant failed while plaintiff was driving his Opel automobile in Colorado. The plaintiff's father had purchased the car in Illinois. The Illinois Supreme Court upheld jurisdiction over defendant on the grounds that defendant had introduced its tires into the stream of commerce, that those tires came into Illinois on a regular basis as part of the Opel car (though defendant never directly shipped any of its products into Illinois), and that such presence of its product in the state constituted the transaction of business. *Id.* at 406, 389 N.E.2d at 160. The critical factor in this case—as in other product liability cases based on 17(1)(a)—was the presence of defendant's product within the state. *Id.* at 402-03, 389 N.E.2d at 159.

This hybrid claim illustrates the functional differences between (1)(a) and (1)(b). The "transaction of business" clause in (1)(a) applies to actions of nonresident defendants who breach a duty "arising from" in-state activities.[94] It applies primarily to breach of contract claims between the defendant and the party with whom he dealt in Illinois.[95] The application of (1)(a) to the *In re Amoco Cadiz* dispute is therefore questionable. None of the parties had contracted with Astilleros in Illinois and no claims for breach of contract—or quasi-contract, for that matter—were raised.[96]

The "tortious act" provision, on the other hand, covers the out-of-state defendant to product liability suits who either designs, manufactures, or sells a defective product in-state, or who sends the defective product, via the stream of commerce, into Illinois where it injures plaintiff.[97] Section (1)(b), therefore, also does not apply to the *In re Amoco Cadiz* suit. The design,

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94. *See, e.g., Scovill,* 461 F.2d at 897; DuPage Aviation Corp. v. First Nat'l Bank and Trust Co., No. 81 Civ. 5336 (N.D. Ill., April 6, 1982) (nonresident defendants' contract negotiations with plaintiff in Illinois supported the exercise of personal jurisdiction pursuant to section 17(1)(a) for purposes of claims of breach of contract and tortious interference with contract); Otis Clapp and Son, Inc. v. Filmore Vitamin Co., No. 78 Civ. 3451 (N.D. Ill., Jan. 22, 1982) (nonresident defendant's business contacts with Illinois were sufficiently related to plaintiff's breach of contract claim to justify the exercise of personal jurisdiction pursuant to section 17(1)(a)); Empress Int'l, Ltd. v. Riverside Seafoods, Inc., 112 Ill. App. 3d 149, 445 N.E.2d 371 (1st Dist. 1983) (Wisconsin corporation subject to jurisdiction in Illinois because it transacted business in Illinois when it sent orders for merchandise into Illinois).

For post-1983 cases, see Jacobs/Kahan and Co. v. Marsh, 740 F.2d 587 (7th Cir. 1984) (nonresident defendants' partial negotiation and execution of a contract while they were present in Illinois were sufficient contacts to uphold the exercise of personal jurisdiction in a suit for breach of contract); Feldman Assoc. v. LinGard and Assoc. Inc., 676 F. Supp. 877, 880 (N.D. Ill. 1988) ("Once a nonresident corporation comes to Illinois and conducts substantial negotiations concerning a contract, that corporation exposes itself to Illinois jurisdiction in the event the contract becomes the subject of the litigation."); Mandalay Assoc. Ltd. v. Hoffman, 141 Ill. App. 3d 891, 491 N.E.2d 39 (1st Dist. 1986) (nonresident defendant's negotiation of partnership agreement in Illinois constituted sufficient contacts with the state to support the exercise of jurisdiction in an action for breach of the agreement); First Nat'l Bank of Chicago v. Boelcskevy, 126 Ill. App. 3d 271, 466 N.E.2d 1182 (1st Dist. 1984) (nonresident defendant's guaranty of a loan from an Illinois bank to an Illinois business, where the guaranty was negotiated in Illinois, received there, and returned to the bank there properly subjected him to jurisdiction in Illinois in an action to enforce the guaranty).

95. *See Scovill,* 461 F.2d at 897. Similarly, the state court in *Empress Int'l* wrote: "What is important is that the defendant voluntarily entered into a business transaction with an entity he knew, or should have known, was an Illinois resident. In addition, the contract which is the subject matter of this action was formed in Illinois . . . . Finally, we find that the contract was performed in Illinois." 112 Ill. App. 3d at 154, 445 N.E.2d at 374.

96. Wrote Judge McGarr: "The cause of action [of Amoco Transport] sounds *in tort* for alleged negligence in the design and manufacture of the steering and other vital systems of the Amoco Cadiz." *In re Oil Spill,* 491 F. Supp. at 174 (emphasis added).

97. *See, e.g.,* Gray v. American Radiator and Standard Sanitary Corp., 22 Ill. 2d 432, 176 N.E.2d 761 (1961) (manufacturer of a defective product designed, manufactured, and sold out-of-state was subject to Illinois jurisdiction because product caused an injury within Illinois).

manufacture, sale, and injury all occurred outside of Illinois, not to mention the United States.[98]

Despite the apparent mutual exclusivity of these two sections, the Illinois courts and federal courts interpreting Illinois law have not construed the "transaction of business" clause to preclude tort claims altogether.[99] However, in all tort claims predicated on the "transaction of business" provision at the time of the *In re Amoco Cadiz* litigation, either the defendant had transacted business in Illinois with plaintiff,[100] the defendant had introduced a product into Illinois in the course of its business operations,[101] or the defendant's in-state conduct was tortious or statutorily disallowed.[102]

In the product liability context, the presence of defendant's product in Illinois often causes (1)(a) and (1)(b) to overlap.[103] The 1978 case of *Dalton*

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98. Courts applying sections 17(1)(a) and (b) have long recognized this distinction: "Section 17(1)(a) was designed to give long arm jurisdiction to the State of Illinois in contract situations; alternatively, section 17(1)(b) was designed to give long arm jurisdiction in tort situations." Process Church of Final Judgment v. Sanders, 338 F. Supp. 1396, 1398 (N.D. Ill. 1972).

99. *E.g.*, Hutter Northern Trust v. Door County Chamber of Commerce, 403 F.2d 481 (7th Cir. 1968) (jurisdiction under 17(1)(a) was upheld over a Wisconsin-based Chamber of Commerce for maliciously interfering with plaintiff's Wisconsin resort business through its purposeful omission of plaintiff's name in various advertising practices conducted in the Chicago area); Clements v. Barney's Sporting Goods Store, 84 Ill. App. 3d 600, 406 N.E.2d 43 (1st Dist. 1980) (defendant-foreign boat manufacturer, was subject to Illinois jurisdiction under 17(1)(a) in breach of warranty action in light of its many state contacts, which included displaying its boats and distributing its literature at a boat show in Illinois, advertising in magazines which had Illinois subscribers, and selling its boat to Illinois retailers); Morton v. Environmental Land Sys., Ltd., 55 Ill. App. 3d 369, 370 N.E.2d 1106 (1st Dist. 1977) (in buyer's action for misrepresentation and fraud against nonresident sellers, jurisdiction under 17(1)(a) was justified on account of sellers' solicitation of business and buyer's tender of purchase price within state).

100. *See Morton,* 55 Ill. App. 3d 369, 370 N.E.2d 1106 (1st Dist. 1977) (solicitation of, purchase, and sale of property occurred in Illinois); DuPage Aviation Corp. v. First Nat'l Bank and Trust Co., No. 81 Civ. 5336 (N.D. Ill. April 6, 1982) (contract negotiations in Illinois supported jurisdiction over claim for tortious interference of contract).

101. *See* Connelly v. Uniroyal, Inc., 75 Ill. 2d 393, 389 N.E.2d 155 (1st Dist. 1979), *cert. denied,* 444 U.S. 1060 (1980) (defendant-manufacturer's automobile was purchased in state by state resident and used for substantial period in Illinois); Dalton v. Blanford, 67 Ill. App. 3d 91, 383 N.E.2d 806 (5th Dist. 1978) (allegedly defective product sold in Illinois); *Clements,* 89 Ill App. 3d 600, 406 N.E.2d 43 (1st Dist. 1980) (allegedly defective boat sold in Illinois through Illinois retailer).

102. People *ex rel* Scott v. Police Hall of Fame, 60 Ill. App. 3d 331, 376 N.E.2d 665 (1st Dist. 1978) (action against Florida not-for-profit corporation for its fraudulent fund-raising activities in Illinois). *See Hutter,* 403 F.2d 481 (7th Cir. 1968) (by advertising in Illinois without mentioning plaintiff's business, defendant Chamber of Commerce conducted activity which maliciously interfered with Illinois hotel business); Koplin v. Thomas, Haab & Botts, 73 Ill. App. 2d 242, 219 N.E.2d 646 (1st Dist. 1966) (action for damages charging out-of-state broker with violation of Illinois laws prohibiting gambling in securities).

103. The presence of defendant's product in the forum state appears to be the critical factor in products liability claims based on 17(1)(a). *See Connelly,* 75 Ill. 2d at 393, 389 N.E.2d at 160; *Dalton,* 67 Ill. App. 3d at 91, 383 N.E.2d at 809-10.

Several cases after 1983 have also based personal jurisdiction over the nonresident defendant pursuant to 17(1)(a), where defendant's primary contact with Illinois was the presence of its

v. Blanford,[104] cited by both district and circuit courts, illustrates this connection between product-presence and jurisdiction. In *Dalton,* the defendant sold a saddle to plaintiff in Illinois. After a fall from a horse, plaintiff brought a product liability claim in Illinois, alleging that the fall was caused by a defect in the saddle. The defendant then filed an indemnity claim against the nonresident manufacturer.

In exercising jurisdiction over the third-party defendant, the manufacturer, the *Dalton* court found significant the following two facts: 1) that the manufacturer had on more than one occasion solicited the sale of its saddles at the same auction barn at which the sale in question had taken place;[105] and, 2) that the defendant and manufacturer were engaged in a relationship in which they took turns selling saddles at the sales barn.[106] Proceeding from these findings, the court concluded that a "sufficient nexus" existed between the manufacturer's solicitation and its associate's indemnity claim to satisfy the "arising from" requirement of section 17(1)(a).[107] Although the third-party plaintiff was a nonresident, the contract between it and the manufacturer was performed primarily out-of-state, and Illinois law did not govern the dispute, the court upheld jurisdiction.

Jurisdiction in *Dalton* was predicated, therefore, on the grounds that the manufacturer had actively pursued the sale of its products in Illinois and that it had knowledge that its products would be introduced, via its associate, into an Illinois market. The *In re Amoco Cadiz* case differs from *Dalton* in that Astilleros did not "solicit" the sale of its product in Illinois;[108] the product itself never entered Illinois; the parties to the contract never intended for it to be brought into the state; and, the parties to the indemnity dispute did not have a preexisting contractual relationship.

In addition to its parallel to the *In re Amoco Cadiz* litigation, the *Dalton* decision also provides insight into some of the implications of section 17(1)(a). One of these implications is that the section is more applicable to suits where the parties to the dispute are also the parties to the transaction of business in question.[109] Therefore, where the defendant's business contacts with the state do not involve the plaintiff directly and defendant's conduct

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product. *E.g.,* Mason v. F. LLI Luigi & Franco Dal Maschio FU G.B., 832 F.2d 383 (7th Cir. 1987); Wiles v. Morita Iron Works Co., Ltd., 152 Ill. App. 3d 782, 504 N.E.2d 942 (1st Dist. 1987). *See also* McKnelly v. Whiteco Hospitality Corp., 131 Ill. App. 3d 338, 475 N.E.2d 992 (1st Dist. 1985) (court denied jurisdiction over defendant's indemnity claim against nonresident third-party defendant for alleged improper installation of a whirlpool machine when injury, performance, and product-use all took place out of state).

104. 67 Ill. App. 3d 91, 383 N.E.2d 806 (5th Dist. 1978).

105. *Id.* at 95-96, 383 N.E.2d at 810.

106. *Id.*

107. *Id.*

108. *See supra* part II (Astilleros neither solicited the sale of its product nor tried to sell its product through Illinois market).

109. While this principle does not hold, of course, in the products liability area, its general application can often be seen in cases using section 17(1)(a). *See supra* notes 94 & 95.

is not itself wrongful, then jurisdiction will only exist if either the defendant has engaged in a business relationship with an Illinois resident who in turn has transacted related business with the plaintiff,[110] or if the defendant has sent a product into Illinois.[111]

One commentator breaks down the section 17(1)(a) precedents into two categories.[112] According to this author, in cases involving a single business transaction, as opposed to those in which the defendant has "continuous and substantial" business activity in Illinois, 17(1)(a) may be invoked in only two situations. One is where the nonresident defendant has entered the state to initiate a business transaction with the plaintiff.[113] The other situation involves a contractual agreement whereby at least partial performance on behalf of one of the parties is to take place in Illinois.[114] *Dalton,* presumably, would fall under the coverage of the latter scenario, because the manufacturer's solicitation of business in Illinois was apparently related to its associate's sales of its products in the state. Partial performance of the agreement, therefore, was to take place, and did take place, within Illinois.

The *In re Amoco Cadiz* circumstances, on the other hand, do not fit into either prong of this test. In the first place, the entity with whom Astilleros contracted in Illinois was not a party to the suit. This fact would negate either test, because a contractual relation between the litigants is a prerequisite to this model. Secondly, as mentioned, Astilleros did not "initiate" its Chicago business transaction; nor did the contract call for any of the performance to take place in Chicago.

Nonetheless, it should be noted that there are Illinois product liability cases in which the disputants did not have a contractual relationship and yet jurisdiction was upheld. In each of these cases, however, the defendant's business consisted, at least partially, of sending its goods into Illinois.[115]

This product liability exception to the above test also reflects another theme present in *Dalton.* This theme, later reinforced by the Supreme Court in *World-Wide Volkswagen v. Woodson,*[116] asserts that it is not unduly burdensome to hale a nonresident defendant into court who should have

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110. This exception is best illustrated by post-1983 cases. *See* John Walker and Sons Ltd. v. De Mert & Dougherty, Inc., 821 F.2d 399 (7th Cir. 1987) (defendant's ongoing relationship with Illinois resident was a sufficient contact where plaintiff's suit for trademark infringement was based on those in-state activities); Deluxe Ice Cream Co. v. R.C.H. Tool Corp., 726 F.2d 1209 (7th Cir. 1984) (defendant was amenable to suit in Illinois where defendant had engaged in substantial negotiation with Illinois resident who in turn entered into contract with plaintiff).

111. For a discussion of the type of contacts which satisfy this analytical strain see *supra* notes 93 & 103.

112. Comment, *Illinois Long Arm Jurisdiction: The Implication of a "Fixed Meaning,"* 32 DEPAUL L. REV. 635 (1983) [hereinafter Comment, *A "Fixed Meaning"*].

113. *Id.* at 644.

114. *Id.* at 645.

115. *See supra* note 103.

116. 444 U.S. 286 (1980).

anticipated that its products would be purchased in the forum state.[117] In *Dalton,* the court dismissed the manufacturer's contention that it did not know that its products would be sold in Illinois.[118] The surrounding circumstances implied that the saddlemaker should have known that its products would reach an Illinois market. The Supreme Court later ruled that such inferences did not violate the due process clause.[119]

The court in *Dalton* had to infer foreseeability in order to circumvent the prohibitive statutory language of 17(1)(a). Because the defendant's indemnity claim had to "arise from" the manufacturer's Illinois business transactions, to which the defendant was not a party, the court had to impute a mutual understanding that the manufacturer's solicitations also applied to goods made by the manufacturer, though sold by the defendant. To this end the *Dalton* court stated: "The record suggests that the relationship existed between [the manufacturer] and [the defendant] whereby they took turns selling saddles at the sales barn. . . . [Defendant's] receipt of saddles in Oklahoma would be a natural incident of such a relationship."[120] Embodied within this relationship, therefore, was the shared expectation that some of the saddlemaker's products would be sold in Illinois, regardless of who the peddler in any one instance happened to be. Because of this common outlook, a "sufficient nexus" existed between the solicitation and subsequent sales, such that the indemnity claim could be said to "arise from" those solicitations.[121]

This liberal construction of the "arising from" standard is another feature of section 17(1)(a) which *Dalton* reflects. Illinois courts, in general, have been inclined to read this requirement broadly in favor of the party asserting jurisdiction.[122] Synonyms for the "arising from" mandate include that the

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117. Wrote the *World-Wide Volkswagen* Court: "The forum State does not exceed its powers under the Due Process Clause if it asserts personal jurisdiction over a corporation that delivers its products into the stream of commerce with the expectation that they will be purchased by consumers in the forum State." *Id.* at 297-98 (*citing* Gray v. American Radiator and Standard Sanitary Corp., 22 Ill. 2d 432, 176 N.E.2d 761 (1961)).

118. Dalton v. Blanford, 67 Ill. App. 3d 91, 97, 383 N.E.2d 806, 809-10 (5th Dist. 1978).

119. *See supra* note 117 and accompanying text for a complete discussion of this point. Once again *In re Amoco Cadiz* differs from *Dalton* because Astilleros could not have foreseen sale of its product in Illinois.

120. *Dalton,* 67 Ill. App. 3d at 97, 383 N.E.2d at 809-10. The *Dalton* Court noted that the sale of several of the manufacturer's saddles took place at its associate's auction barn in Springfield, Illinois within a short period of time. Since the manufacturer's acts in Illinois were related and had one general purpose, the court held that none of the sales could be considered an isolated transaction. The court rejected the manufacturer's attempt to elude jurisdiction by professing ignorance of the ultimate destination of its goods, because the saddles which the manufacturer sold to its associate out of state were sent to the same auction barn in Illinois where the manufacturer had conducted jurisdictional activities. *Id.*

121. *Dalton,* 67 Ill. App. 3d at 97, 383 N.E.2d at 810.

122. *See* NTN Bearing Corp. v. Charles E. Scott, Inc., 557 F. Supp. 1273, 1275-76 (N.D. Ill. 1983) (recounting history of the Illinois long-arm statute and concluding that "the term 'arose from' as used in the . . . statute is liberally construed by Illinois courts").

cause of action "relate to" defendant's activities,[123] or that a "close relationship" exist between the two events.[124] Perhaps the most popular standard, and the one referred to in both district and circuit court opinions, is that the plaintiff's claim must "lie in the wake of" defendant's in-state activities.[125] Inherent in each of these standards is the belief that the Long-Arm Statute is to be extended as far as the due process clause of the fourteenth amendment will permit.[126]

In 1981, however, the Illinois Supreme Court retreated from this limits-of-due-process rationale. In *Green v. Advance Ross Electronics Corp.*,[127] and then again in *Cook Associates, Inc. v. Lexington United Corp.*,[128] the Court stated that the limits under the Long-Arm Statute should not be equated with the "minimum contacts" test of the due process clause.[129] Rather, the long arm statute "should have a fixed meaning without regard to changing concepts of due process, except of course, that an interpretation which renders the statute unconstitutional should be avoided, if possible."[130]

In spite of its avowed retreat, however, the Illinois Supreme Court did not indicate whether this "fixed meaning" should be expansive, restrictive, or somewhere in between.[131] Consequently, lower court cases subsequent to *Green* have approached the long arm statute with some confusion. While some courts maintain that the statute should be read, as before, to the limits of due process,[132] other courts have assumed that the 1981 decisions imply

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123. Volkswagen Ins. Co. v. Whittington, 58 Ill. App. 3d 621, 625, 374 N.E.2d 954, 957 (1st Dist. 1978) ("[t]he foreign corporation's business within Illinois must be related to the cause of action in question before section 17(1)(a) will confer personal jurisdiction").

124. Johnston v. United Presbyterian Church, 103 Ill. App. 3d 869, 872, 431 N.E.2d 1275, 1278 (1st Dist. 1981) ("the phrase 'arising from' . . . requires that there be a sufficiently close relationship between the defendant's activities within the State and the litigation against him").

125. Koplin v. Thomas, Haab & Botts, 73 Ill. App. 2d 242, 253, 219 N.E.2d 646, 651 (1st Dist. 1966) ("the statutory phrase 'arising from' requires only that the plaintiff's claim be one which lies in the wake of the commercial activities by which the defendant submitted to the jurisdiction of Illinois courts").

126. *Volkswagen Ins. Co.*, 58 Ill. App. 3d at 623, 374 N.E.2d at 956 ("Section 17 of the Civil Practice Act . . . extends the personal jurisdiction of Illinois courts over nonresident defendants to the extent permitted by the due process clause of the fourteenth amendment . . . ."); *Johnston*, 103 Ill. App. 3d at 872, 431 N.E.2d at 1278 ("The legislative extent of section 17 is to provide the means for asserting personal jurisdiction over nonresident defendants consistent with federal due process requirements); *Koplin*, 73 Ill. App. 2d at 249, 219 N.E.2d at 649 ("[s]ection 17 reflects the legislative intention to exert judicial jurisdiction over nonresident defendants to the extent permitted by the due process clause"). *See also* Nelson v. Miller, 11 Ill. 2d 378, 143 N.E.2d 673 (1957).

127. 86 Ill. 2d 431, 427 N.E.2d 1203 (1981).

128. 87 Ill. 2d 190, 429 N.E.2d 847 (1981).

129. *Id.* at 197-98, 429 N.E.2d at 850.

130. 86 Ill. 2d at 436, 427 N.E.2d at 850.

131. *See* Comment, *A "Fixed Meaning," supra* note 112, at 637.

132. *See, e.g.*, First Nat'l Bank of Chicago v. Boelcskevy, 126 Ill. App. 3d 271, 466 N.E.2d 1182 (5th Dist. 1984), where the court stated: "It is important to note that *Cook* represented no fundamental narrowing of the long-arm statute or retreat from its liberal construction, but merely observed that the statute's liberal purpose must be construed within its terms." *Id.* at 273, 466 N.E.2d at 1185.

that the statute now requires more activity in the State of Illinois than does the due process "minimum contacts" test.[133]

In general, these interpretations can be categorized into one of two schools of thought. One school reads the clause to require only that an historic connection exist between the defendant's in-state activities and the cause of action. The "in the wake of" standard exemplifies this approach. "The minimum relationship required," the Northern District has written, "is that the plaintiff's suit be one which lies in the wake of the commercial activities by which the defendant submitted to the jurisdiction of Illinois courts."[134]

The other school embraces the notion of substantive relevance. Under this principle, only the defendant's contacts which are relevant to the merits are significant.[135] In other words, only "[a] forum occurrence which would ordinarily be alleged as part of a comparable domestic complaint"[136] would meet the "arising from" standard.

Some courts have employed forms of this requirement.[137] In a 1982 dispute between two Iowa banks concerning the alleged payment of a forged check drawn on an Illinois bank account, the Seventh Circuit used this principle to dismiss the complaint for lack of personal jurisdiction. It reasoned:

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133. *See, e.g.,* DuPage Aviation Corp. v. First Nat'l Bank and Trust Co., No. 81 C 5336 (N.D. Ill., April 6, 1982). The court stated: "The *Green* and *Cook Associates* decisions . . . give little guidance to the meaning to be attached to the term[] 'transaction of business' . . . other than to suggest implicitly that [it] require[s] more activity in the State of Illinois than does the due process 'minimum contacts' test." *Id.* at 2.

134. NTN Bearing Corp. v. Charles E. Scott, Inc., 557 F. Supp. 1273, 1276 (N.D. Ill. 1983).

135. Brilmayer, *How Contacts Count: Due Process Limitations on State Court Jurisdiction,* 1980 SUP. CT. REV. 77, 82-83.

136. *Id.* at 82. Application of Professor Brilmayer's test highlights the insignificance of Astilleros' Chicago contacts. Wrote counsel for Astilleros: "In the present case, if all of the parties were Illinois residents, if the Amoco Cadiz had run aground in Lake Michigan and polluted the Chicago shoreline and if the claims against Astilleros were the same as those now being asserted, the negotiation and execution of the contract in Illinois, between Astilleros and Tankers, would not be pleaded or proved, nor would subsequent meetings in Illinois be referred to because they are irrelevant to the conduct complained of, the alleged negligent design and manufacture of a ship." *Reply Brief of Appellant Astilleros Espanoles, S.A., supra* note 53, at 10-11.

137. *See, e.g.,* Technical Publishing Co. v. Technology Publishing Corp., 339 F. Supp. 225, 227 (N.D. Ill. 1972) (plaintiff must show that acts upon which claim is based took place in Illinois); Johnston v. United Presbyterian Church, 103 Ill. App. 3d 869, 874, 431 N.E.2d 1275, 1279 (1st Dist. 1981) (single business transaction *with consequences* in Illinois is sufficient to assert jurisdiction over the foreign defendant) (emphasis added); United Air Lines, Inc. v. Conductron Corp., 69 Ill. App. 3d 847, 853, 387 N.E.2d 1272, 1276 (1st Dist. 1979) (on defendants' motion to dismiss for lack of personal jurisdiction, court referred to pre-contract negotiations in Chicago, stating, "it is clear that this act alone, most intimately connected with the contract which is the source of the controversy, is sufficient to require defendants to defend this suit in Illinois").

Perhaps the clearest expression of this concept came from the Seventh Circuit itself: "To compensate for the reach of the 'long arm' of the forum state, it is necessary that the contact of the forum state be the basis of the cause of action sued on." Lindley v. St. Louis—San Francisco Ry. Co., 407 F.2d 639, 642 (1968).

> [I]t is undisputed that all of the activities relevant to [defendant's] alleged liability took place in Iowa, and that its alleged liability is premised on Iowa [law]. . . . It is therefore difficult to imagine any special interest that Illinois could have in a resolution of a dispute between two Iowa banks about facts and law alien to Illinois.[138]

This passage appears to have direct application to many of the causes of action involved in the *In re Amoco Cadiz* litigation. Similar to the above factual skeleton, in the actions brought by the nonresident plaintiffs and nonresident cross-plaintiffs, the court was asked to resolve a dispute between nonresidents "about facts and law alien to Illinois."

State and federal courts have recognized, however, that parallels of this nature are only of marginal help.[139] Due to the absence of a clear definition of the requirements inherent in the "arising from" clause, and a bright line test applicable to the fact-specific nature of the jurisdictional inquiry, previous decisions offer only partial guidance.[140]

Therefore, to determine whether the cause of action "arises from" defendant's in-state activities, courts have applied a case-by-case balancing test.[141] This test, based on the premise that the decision must be made "according to what is fair and reasonable in the particular situation,"[142] considers several factors, none of which is singly controlling.[143] These factors include: who initiated the transaction; where the contract was entered into; and where performance was to take place.[144] Additionally, the nature and quality of the business transaction, the applicability of Illinois law, the contemplation of the parties, and the likelihood that witnesses would be found in Illinois are also relevant.[145]

Read as a unit, these factors reflect the underpinnings of section 17(1)(a): namely, that the dispute should be between parties to the transaction of business in question, or, at the least, that plaintiff should be injured as a result of defendant's in-state contractual performance; otherwise, the defendant's in-state conduct must be wrongful in and of itself. The facts of the *In re Amoco Cadiz* litigation, however, do not rest on any of these foundations.[146] Indeed, in order to avoid any chance of being haled into an

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138. Froning and Deppe, Inc. v. Continental Ill. Nat'l Bank & Trust Co., 695 F.2d 289, 294 (7th Cir. 1982).

139. 139. *See* DuPage Aviation Corp. v. First Nat'l Bank and Trust Co., No. 81 C 5336, slip op. at 5 (N.D. Ill. April 6, 1982) ("other cases involving issues of personal jurisdiction are rarely controlling because of the factual nature of the inquiry").

140. *Id.*

141. *See supra* note 23 (discussing factors involved in balancing the interests).

142. Lima v. Disney World, Inc., 47 Ill. App. 3d 658, 660, 365 N.E.2d 89, 92 (1975).

143. Empress Int'l, Inc. v. Riverside Seafoods, Inc., 112 Ill. App. 3d 149, 153-54, 445 N.E.2d 371, 373 (1983).

144. *Id.*

145. Mergenthaler Linotype Co. v. Leonard Starch Enters., Inc., 66 Ill. App. 3d 789, 797, 383 N.E.2d 1379, 1385 (1st Dist. 1978).

146. *In re Amoco Cadiz,* 699 F.2d 909, 915 (7th Cir. 1983).

Illinois court, Astilleros specifically provided that disputes between it and Amoco Tankers, the party with whom it transacted business in Illinois, should be resolved elsewhere.[147]

Significantly, only one of the factors relevant to determining whether a cause of action "arises from" a defendant's in-state activities applies to the *In re Amoco Cadiz* case. Although ratification of the contract took place in Liberia,[148] Astilleros did enter into a contract agreement in Illinois. However, Amoco Tankers, the party with whom Astilleros contracted, was not a party to the litigation. Moreover, Astilleros did not initiate the business transaction,[149] nor did it perform any of the contract in Illinois. Further, the nature of the transaction was to provide for the manufacture of a ship in Spain, the substantive law involved was French, witnesses and evidence to the alleged tortious conduct were located in Spain,[150] and the parties to the contract anticipated that any dispute between them would be resolved in England under English law.

Astilleros also made sure that the core of the transaction occurred outside of Illinois: the manufacture, sale, and delivery of the ship all took place in Spain. Astilleros thus anticipated the advice of Justice White in *World-Wide Volkswagen,*[151] advice which was later articulated by an Illinois court: "If a manufacturer in a foreign country wants to avoid products liability, it can cause the American purchaser to consummate the transaction and take delivery in the foreign country."[152]

Arguably, the "American purchaser" requirement could defeat the assertion of jurisdiction itself under current constitutional standards. That clause notwithstanding, however, it is also evident that the actions brought in the *In re Amoco Cadiz* case failed to satisfy any of the state statutory requirements of section 17(1)(a): Astilleros did not transact business with any of

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147. *Id.*

148. The only factor in Amoco's favor, the formation of the contract in Illinois, is arguably also an occurrence which took place out-of-state, in light of the ratification requirement. Writes one Illinois court: "The long-established rule in Illinois is that the place where the last act necessary to give the contract validity took place is the place where the contract is made." Youngtown Sheet and Tube Co. v. Industrial Comm'n, 79 Ill. 2d 425, 433, 404 N.E.2d 253, 257 (1980).

149. *See supra* part II of this Article (discussing facts).

150. *See* Reese & Galston, *Doing an Act or Causing Consequences as Basis for Judicial Jurisdiction,* 44 IOWA L. REV. 249 (1959): "Also material [in a jurisdictional analysis] is whether the witnesses reside in the state where [the jurisdictional] act was done. If so, that state is more likely to have judicial jurisdiction, since trial there would spare defendant the expense of transporting his witnesses from one state to another." *Id.* at 260.

151. "[A nonresident corporation] can act to alleviate the risk of burdensome litigation by procuring insurance, passing the expected costs on to customers, or, if the risks are too great, severing its connection with the State." World-Wide Volkswagen v. Woodson, 444 U.S. 286, 297 (1980).

152. Wiles v. Morita Iron Works Co., Ltd., 152 Ill. App. 3d 782, 791, 504 N.E.2d 942, 948 (1st Dist. 1987).

the litigants,[153] it did not send its product into Illinois,[154] nor were its in-state activities tortious in themselves.[155]

B. *The District Court Decision*

In finding that Illinois did have jurisdiction over Astilleros, Judge McGarr ignored any functional limitations on the Illinois Long-Arm Statute and, instead, simply focused on whether claims based on negligent construction "lay in the wake" of contract negotiations for that construction.[156] That the parties bringing the action were not the parties to the negotiations was not a relevant issue under his analysis.[157] By allowing such claimants as the French and the Liberians to sue the Spanish in Chicago, Judge McGarr demonstrated the unprincipled elasticity of the "in the wake of" inquiry, as well as its vulnerability to judicial abuse.

In addition, by not explaining what factors shape the parameters of the wake, Judge McGarr allowed his analysis to stand on the premise that a products liability claim will always "arise out of" the contract negotiations for that product. That such an expansive result could be predicated on such an anemic analogy reflects the inherent danger of enshrining a metaphor in a jurisdictional standard. This is the case especially with the metaphor in question, as the width of a wake directly depends on the speed at which the vessel travels. Such a "technical"[158] consideration, however, as with others, apparently did not rise to a sufficient level of importance to merit judicial attention.

Nonetheless, despite its hollow reasoning, it is important to note that the District Court opinion only addressed Astilleros' motion to dismiss the limitation action brought by Amoco Transport.[159] By dismissing the other Amoco parties from the action, Judge McGarr indicated that he considered them separate legal entities. They, therefore, could not act as one party in this limitation action, because only the ship's owner could bring such a claim. This fact is significant when contrasted with Judge Posner's analysis, as will be discussed below.

This view of the Amoco parties as separate entities also explains why Judge McGarr did not issue a separate opinion when he later denied Astil-

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153. *See supra* notes 94 & 100 (discussing precedents establishing the sufficiency of this contact under Illinois law).

154. *See supra* note 101 (discussing precedents establishing the sufficiency of this contact under Illinois law).

155. *See supra* note 102 (discussing precedents establishing the sufficiency of this contact under Illinois law).

156. *In re Oil Spill,* 491 F. Supp. 170, 174 (N.D. Ill. 1979).

157. *Id.*

158. Judge McGarr underscored the purposefulness of Astilleros' contacts with Chicago by emphasizing that the contract negotiations concerned "technical aspects of the Amoco Cadiz." *Id.*

159. Judge McGarr wrote: "This decision . . . relates only to the limitation action [brought by Transport], though its reasoning may have broader application." *Id.* at 171.

leros' motion to dismiss the French claims: he had treated Amoco Transport as a nonresident plaintiff with no contractual relationship with Astilleros, who was injured outside of Illinois. The French claimants were essentially in the same position. In denying Astilleros' motion against the French, Judge McGarr was thus justified in referring to his previous opinion for support.

Amoco Transport's action, therefore, constituted a claim brought by a nonresident plaintiff against a nonresident defendant, with whom plaintiff had no contractual relationship, for an injury which occurred outside of Illinois. Because the tortious act in question happened out-of-state, jurisdiction could only be predicated on the "transaction of business" clause of 17(1)(a). However, unlike other tort cases based on 17(1)(a) where defendant had not previously transacted business with plaintiff, defendant's tortious conduct was not performed in-state, nor did defendant send its product into Illinois.[160]

Judge McGarr, however, avoided these factual qualifications to 17(1)(a) by beginning his analysis with the statement that, for jurisdiction to be upheld, "[t]he tort must simply 'lie in the wake of' defendant's in-state commercial activity."[161] Thus, by reading the statute to require only an historic connection between defendant's activities and the cause of action, Judge McGarr made other questions regarding the character of the parties (resident or nonresident), or their actions, immaterial.

Judge McGarr cited five cases to support this interpretation of section 17(1)(a).[162] Four of these cases, however, were not product liability suits, although they did involve the deliberate introduction of a good or service into the state by the defendant, such as the circulation of a libelous publication. Moreover, in each of these four, the plaintiff was an Illinois resident, the conduct complained of occurred in Illinois, and, as mentioned, each defendant had brought its product or service into the state.[163] The fifth case,

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160. *See supra* text accompanying notes 154-55 (further discussing this lack of contacts with Illinois).

161. *In re Oil Spill*, 491 F. Supp. at 173.

162. Continental Nut Co. v. Robert L. Berner Co., 345 F.2d 395 (7th Cir. 1965); Technical Publishing Co. v. Technology Publishing Corp., 339 F. Supp. 225 (N.D. Ill. 1972); Insull v. New York World-Telegram Corp., 172 F. Supp. 615 (N.D. Ill. 1959); Dalton v. Blanford, 67 Ill. App. 3d 91, 383 N.E.2d 806 (5th Dist. 1978); People *ex rel.* Scott v. Police Hall of Fame, 60 Ill. App. 3d 331, 376 N.E.2d 665 (1st Dist. 1978).

163. *Continental Nut* concerned an action in libel by an in-state plaintiff against nonresident defendants who had allegedly published libelous material in Illinois which injured plaintiff. 345 F.2d at 399. *Technical Publishing* involved a complaint by an Illinois plaintiff for unfair competition against a nonresident defendant who used a similar trade name on publications circulated in Illinois. 339 F. Supp. at 225. In *Insull*, the district court held that foreign publishing corporations were not transacting business under 17(1)(a) merely by shipping their publications into the state to subscribers or to independent contractors for resale. 172 F. Supp. at 630. In *Scott*, nonresident defendants' charitable solicitations in Illinois allegedly violated an Illinois statute governing fund raising, and the materials which they distributed in conjunction with their solicitations were alleged to be fraudulent. 60 Ill. App. 3d at 338, 376 N.E.2d at 668.

Dalton, was a product liability case which involved the sale of the manufacturer's goods in Illinois.[164]

Despite the factual unity of these cases and their facial dissimilarity with the *In re Amoco Cadiz* situation, Judge McGarr nevertheless asserted that, if Astilleros' negotiations in Chicago constituted the "transaction of business," and if the tort claim "lay [sic] in the wake" of those activities, then Astilleros was within the jurisdiction of Illinois.[165] The nature of the negotiations provided the necessary link for Judge McGarr. He reasoned that because the tort claim and the business transaction each concerned the design and manufacture of the ship, the claim fell within the boundaries of the wake.[166]

Judge McGarr's analysis, however, was nothing more than the superficial act of label imposition. Nowhere in the opinion did he discuss the factors relevant in determining what constitutes the "transaction of business"; nor did he elaborate on the considerations which should be used to divine the width of the wake he invoked, or its length. Rather, without discussion, Judge McGarr concluded that voluntary contract negotiations qualified as a "transaction of business," and that an action in tort concerning the subject matter of those negotiations must necessarily lie in their wake.[167]

Noticeably absent from the opinion were those factors usually employed by courts undertaking a section 17(1)(a) "arising from" analysis: the contemplation of the parties, the applicability of Illinois law, and the accessibility of witnesses and evidence.[168] By omitting such considerations, as well as by

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164. *See supra* part III(A) for a complete discussion of *Dalton.*

165. *In re Oil Spill,* 491 F. Supp. at 173.

166. *Id.* at 174.

> By voluntarily conducting negotiations in Illinois concerning the design and manufacture of the Amoco Cadiz, Astilleros conducted activities within the state, thereby invoking the benefits and protection of its laws. The nature and quality of its acts constituted the transaction of business out of which Transport's cause of action arose. The claim of alleged negligent design and manufacture of the tanker "lies in the wake" of the negotiations.

Id.

167. *Compare* McGarr: "The claim of alleged negligent design and manufacture of the tanker 'lies in the wake of' the negotiations which took place in Chicago," *with* DesCartes, "I think, therefore I am." For both authors, the assertion of their first premise (claim of negligent design and thinking) necessarily leads them to their conclusion ("in the wake of" and existence). While DesCartes can get away with such an a priori conclusion, Judge McGarr cannot.

DesCartes makes the act of thinking tautological with existence; this unilateral tautology is valid because thinking necessarily implies being (though an object may exist without self-contemplation, hence the use of the term "unilateral"). However, it would seem that one may bring an action for alleged negligent design and manufacture of a product without having this claim necessarily "lie in the wake of" the contract negotiations for that product (i.e., if these negotiations had taken place in, say, Moscow, Idaho, would courts sitting in Idaho have jurisdiction over Astilleros?). Despite its rhetorical tone, this question at least indicates that Judge McGarr should have provided a more detailed analysis in order to remove the spurious resonances of his conclusion.

168. *See supra* note 23 for a complete discussion of these factors and their origins.

overlooking the factual patterns typically associated with 17(1)(a)'s exercise of jurisdiction over tort claims, Judge McGarr was able to find an historic connection sufficient to meet his version of the "arising from" requirement. In doing so, Judge McGarr demonstrated the danger of a jurisdictional standard which, without restraint, permits judges to read into it their own conceptions of factual causation. Judge McGarr's analysis, however, is at least understandable if not justifiable given the ambiguity with respect to the scope of the Illinois Long-Arm Statute at the time. The same cannot be said for Judge Posner.

C. Due Process Developments

Despite the expansiveness of his decision, Judge McGarr did not find that it violated Astilleros' due process rights. Judge McGarr reasoned that because Astilleros' contacts with Illinois were sufficient enough to invoke the "benefits and protections" of the state's laws, the assertion of jurisdiction would not offend "traditional notions of fair play and substantial justice."[169] The gravamen of Judge McGarr's analysis, therefore, concerned the "quality and nature" of Astilleros' contacts.[170] The jurisdictional sufficiency of the contacts depended, in turn, on whether they invoked the "benefits and protections" of Illinois' laws.

Judge McGarr's analysis was based largely on the 1958 Supreme Court decision of *Hanson v. Denkla*.[171] It was in *Hanson* that the Court first fashioned the notion of "purposeful availment"; a concept which means that a defendant's contacts with the state must be more than incidental for the exercise of jurisdiction to be proper.[172] A contact would be "purposeful," said the Court, if it invoked the "benefits and protections" of the state's laws.[173] *Hanson's* purposeful availment inquiry represented a judicial polish on the minimum contacts test articulated by the Court in its seminal decision, *International Shoe Co. v. Washington*.[174] The core of this test was the determination of whether the defendant had a sufficient association with the state for the court to justify its exercise of power over him. The *Hanson* purposeful availment standard was, therefore, delimited by the restraints of state sovereignty.[175]

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169. 491 F. Supp. at 174.
170. *Id.*
171. 357 U.S. 235 (1958).
172. *Id.* at 253.
173. *Id.*
174. 326 U.S. 310 (1945).
175. The restrictions [on the reach of a state's personal jurisdiction] are more than a guarantee of immunity from inconvenient or distant litigation. They are a consequence of territorial limitations on the power of respective States. However minimal the burden of defending in a foreign tribunal, a defendant may not be called upon to do so unless he has had the "minimal contacts" with that State that are a prerequisite to its exercise of power over him.

Hanson, 357 U.S. at 251.

Thus, embodied within the purposeful availment inquiry were the requirements that the defendant have some connection with the forum state and that at least one of his contacts be substantial enough to invoke the benefits and protections of the state's laws. If such purposeful contacts could be established, and the cause of action was shown to "relate to or arise out of them,"[176] then the state would not exceed the strictures of interstate federalism by asserting jurisdiction. As it turned out, however, Judge Posner was to have far more recent Supreme Court due process standards to guide his inquiry in deciding the appeal from Judge McGarr's decision.

In its 1980 decision in *World-Wide Volkswagen Corp. v. Woodson,*[177] the Court expanded upon some of its due process principles. In *World-Wide,* the Court reaffirmed its position that the minimum contacts test should protect those nonresident defendants who have only attenuated ties to the state from being subjected to suit there.[178] However, the Court also stated that, in "appropriate cases," factors other than the defendant's contacts could be considered in the jurisdictional balance. These factors included: the forum state's interest in adjudicating the dispute; the plaintiff's interest in obtaining convenient and effective relief; the interstate judicial system's interest in obtaining the most efficient resolution of the dispute; and, the shared interest of the several states in furthering fundamental substantive social policies.[179]

Also in *World-Wide,* the Court built upon the purposeful availment standard by incorporating into it the notion of foreseeability. The Court reasoned that the due process clause should uphold the exercise of jurisdiction

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176. International Shoe Co. v. Washington, 326 U.S. 310, 318 (1945).

177. 444 U.S. 286 (1980).

178. *Id.* at 291-92.

179. *Id.* at 292. This is not to imply that *World-Wide Volkswagen* was the first case in which the Court considered these other interests. In McGee v. International Life Ins. Co., 355 U.S. 220 (1957), for example, the Court emphasized the state's and the plaintiff's interest in asserting jurisdiction over a nonresident insurance company. "It cannot be denied that California has a manifest interest in providing effective means of redress for its residents when their insurers refuse to pay claims." *Id.* at 223.

In cases subsequent to *McGee* but prior to *World-Wide*, the Court continued to point to the plaintiff's and the state's interests as relevant factors in the jurisdictional equation, but also noted that they were subordinate to a consideration of defendant's contacts. *See, e.g.,* Rush v. Savchuk, 444 U.S. 320, 322 (1980) (state's and plaintiff's interests in litigating in the forum may not be substituted for defendant's lack of contacts with state); Kulko v. Superior Court, 436 U.S. 84, 92 (1978) ("While the interests of the forum State . . . are, of course, to be considered . . . an essential criterion in all cases is whether the 'quality and nature' of the defendant's activity is such that it is 'reasonable' and 'fair' to require him to conduct his defense in the State"); Shaffer v. Heitner, 433 U.S. 186, 204 (1977) (state's interest in hearing dispute is secondary to a consideration of relationship among "the defendant, the forum, and the litigation").

World-Wide Volkswagen, then, consolidated the various forms which these interests had taken over the years and presented them as elements of a larger equation. The Court "expanded" its approach in the sense that it articulated a unified formula, not simply a line of reasoning tailored to the particular circumstances of the case. *World-Wide Volkswagen,* 444 U.S. at 297.

when the defendant's contacts are such that the defendant should reasonably expect to be haled into court there.[180] In other words, a defendant's contact would be "purposeful" if a reasonable person in defendant's position would have anticipated the out-of-state litigation. The Court justified this refinement on policy grounds: by asserting jurisdiction over only those defendants with purposeful contacts, the courts would provide commercial actors with some guidance as to where they may be subjected to suit.[181]

The only element of the minimum contacts calculus which *World-Wide* did not revise was the adherence to state sovereignty.[182] A year later, however, in *Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinee,*[183] the Court rearticulated its position on this issue as well. In holding that the defense of lack of personal jurisdiction was a waivable right, the Court stated that the minimum contacts test was no longer based on the notion of federalism; rather, it was now premised on protecting the defendant's individual liberty interest.[184]

Although, in one sweep, the Court restructured the theoretical foundations of the minimum contacts test, it did not greatly alter its future application. In the same paragraph, the Court made clear that in a jurisdictional analysis, this test must still be applied to the defendant's relationship with the state.[185]

What the Court did change, though, was its approach to jurisdictional questions. The interest of other states in resolving the dispute was no longer

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180. 444 U.S. at 297.

181. *Id.* The Court reasoned: "The Due Process Clause, by ensuring the 'orderly administration of the laws,' gives a degree of predictability to the legal system that allows potential defendants to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit." *Id.*

182. "The concept of minimum contacts . . . acts to ensure that the States, through their courts, do not reach out beyond the limits imposed on them by their status as coequal sovereigns in a federal system." *Id.* at 291-92.

The Court's recognition of this principle, however, does not mean that the concept of state sovereignty had received uniform treatment from *Hanson* until *World-Wide Volkswagen.* On the contrary, as *supra* note 179 indicates, the Court's attention after *Hanson* focused increasingly on the interests of the nonresident defendant in litigating in a foreign forum, rather than on the interests of the other states in resolving the dispute. If anything, then, *World-Wide Volkswagen* reintroduced the notion of state sovereignty into the jurisdictional calculus. The point made above, therefore, intends only to state that the concept of federalism, as articulated by the *Hanson* Court, was not modified in any significant manner when again considered by the *World-Wide Volkswagen* Court.

For a fuller account of the treatment of this principle from *International Shoe* to *Insurance Corp. of Ireland,* see Lewis, *The Three Deaths of "State Sovereignty" and the Curse of Abstraction in the Jurisprudence of Personal Jurisdiction,* 58 NOTRE DAME L. REV. 699 (1983).

183. 456 U.S. 694 (1982).

184. *Id.* at 703 n.10.

> The restriction on state sovereign power described in *World-Wide Volkswagen Corp.* . . . must be seen as ultimately a function of the individual liberty interest preserved by the Due Process Clause. That Clause is the only source of the personal jurisdiction requirement and the Clause itself makes no mention of federalism concerns.

Id.

185. *Id.*

a valid consideration. Rather, the defendant's interest in not having to litigate in a foreign forum was now the principal concern. With the restrictive notions of federalism removed from the picture, courts should now devote their full attention to coordinating the other elements articulated in *World-Wide:* the requirement that defendant have purposeful contacts; the question of whether defendant could reasonably foresee being haled into the forum; the determination of whether the case was "appropriate" enough to consider the interests of the plaintiff and the state; and, if so, the weight to be given to those interests.[186] These factors, moreover, were to be evaluated under the guiding principle of fairness to the defendant.[187]

Such was the status of the due process calculus when Judge Posner decided the *In re Amoco Cadiz* dispute. Unfortunately, however, instead of trying to weave these factors into a uniform jurisdictional standard, Judge Posner resurrected the policies of interstate federalism when addressing Astilleros' due process rights.[188] As mentioned in Part I, the flaw of such an analysis was not in the illegitimacy of the result it reached. Rather, the shortcoming lay in the fact that the analysis discarded established due process standards in order to articulate a largely unsupported legal theory. As will be shown below, this disregard for the prevailing due process principles was only one in a series of judicial evasions which ultimately made up the *In re Amoco Cadiz* decision in the Court of Appeals.

IV. THE *AMOCO CADIZ* DECISION: JUDGE POSNER'S BRAND OF JUDICIAL ACTIVISM

Like Judge McGarr, Judge Posner had to contend with the myriad of parties and their claims, cross-claims, and third-party claims in resolving the litigation. Also like Judge McGarr, the fundamental question before Judge Posner was whether such product liability and indemnity claims "arose from" Astilleros' negotiations in Chicago.[189] But unlike Judge McGarr, Judge Posner seemed to recognize some of the inherent qualifications of section 17(1)(a): the usefulness of a preexisting contractual relationship between the parties to the dispute, a plaintiff who is an Illinois resident,[190] and an action

186. 444 U.S. at 292.

187. *Insurance Corp. of Ireland,* 456 U.S. at 702 ("The requirement that a court have a personal jurisdiction flows not from Art. III, but from the Due Process Clause. The personal jurisdiction requirement recognizes and protects an *individual liberty interest.* It represents a restriction on judicial power not as a matter of sovereignty, *but as a matter of individual liberty.*") (emphasis added).

188. *See In re Amoco Cadiz,* 699 F.2d at 916. Wrote Judge Posner: "[Astilleros] had, we think, a sufficient presence within Illinois to satisfy the territorial notions that *World-Wide Volkswagen* brought back into due process analysis of personal jurisdiction." *Id.*

189. *Id.*

190. While a plaintiff's contacts with Illinois do not, standing alone, permit jurisdiction over a nonresident defendant, it is the plaintiff's Illinois relationship, coupled with the defendant's contact with the plaintiff, that often gives rise to long-arm jurisdiction. DuPage Aviation v.

based on a breach of a duty created in Illinois. Judge Posner, in fact, appeared to read the "arising from" clause to embody a substantive relevance component: "Amoco's cause of action against Astilleros clearly would 'arise from' that transacting [sic] if the cause of action were for a breach of contract, but it is not, not quite anyway."[191]

In upholding jurisdiction over Astilleros, therefore, Judge Posner had to reconcile this substantive relevance consideration with Astilleros' attenuated contacts with the state. He did so by employing a strategy composed of three separate, though interconnected, forms of reasoning: 1) affirmatively piercing the Amoco veil in order to view the Amoco litigants as the other party to the contract;[192] 2) transforming the Amoco tort claim into a quasi-contractual action for breach of an implied duty;[193] and, 3) bootstrapping the otherwise jurisdictionally unfounded claim of the French onto the cross-claims of Amoco in order to exercise jurisdiction over all of the claims to the dispute.[194] All three of these actions rested on assertions which distorted

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First Nat'l Bank and Trust Co., 81 C 5336 (N.D. Ill. April 6, 1982); Otis Clapp and Son, Inc. v. Filmore Vitamin Co., No. 78 C 3451 (N.D. Ill. Jan. 22, 1982). In almost every case, if not in every case, where jurisdiction over nonresidents has been upheld under the Illinois long-arm statute, the nonresident defendant has caused injury or damage to an Illinois plaintiff or to a nonresident plaintiff while present in Illinois; *e.g., DuPage Aviation,* No. 81 C 5336; *Otis Clapp and Son,* No. 78 C. 3451; Gray v. American Radiator & Standard Sanitary Corp., 22 Ill. 2d 432, 176 N.E.2d 761 (1961); Nelson v. Miller, 11 Ill. App. 2d 378, 143 N.E.2d 673 (1957); Koplin v. Thomas, Haab & Botts, 73 Ill. App. 2d 242, 219 N.E.2d 646 (1st Dist. 1966); or the nonresident defendant knew and contemplated that performance or substantial performance of a contract would occur by plaintiff in Illinois; *e.g.,* Cook Assocs., Inc. v. Colonial Broach and Mach. Co., 14 Ill. App. 3d 965, 304 N.E.2d 27 (1st Dist. 1973); or the nonresident defendant stood to obtain benefits, financial or otherwise, from the introduction of his goods or services into Illinois through an Illinois market, *e.g.,* Dalton v. Blanford, 67 Ill. App. 3d 91, 94-95, 383 N.E.2d 806, 808 (5th Dist. 1978); *Koplin,* 73 Ill. App. 2d at 95; 219 N.E.2d at 650.

191. 699 F.2d at 916.

192. *Id.* at 914-15. Whereas Judge McGarr manipulated a metaphor, Judge Posner created a monster: a monolithic, though multi-tentacled, creature which uses its many arms to snare nonresidents in order to bring them back to Chicago forums. Though the imputation of ruthlessness upon Amoco is perhaps misplaced, the suggestion of connivance on Judge Posner's part is not.

Moreover, in creating this monster, Judge Posner too had to exploit a metaphor: piercing the corporation's veil. Like Judge McGarr, Judge Posner manipulated this term of art by ignoring the multi-factored test which accompanies its application. Also, Judge Posner disregarded the requirement that a party must invoke its use before a judge may consider its relevance.

Writes one commentator: " 'Piercing the veil' is a conclusory term that has helped contribute to the conceptual confusion in this area of the law. It should be accorded no meaning except as a summary statement of a court's conclusion that one of the parties before it has been successful in its contention that a corporate entity should be disregarded for the practical purpose involved in a particular case." P. BLUMBERG, THE LAW OF CORPORATE GROUPS 75-76 (1983).

193. 699 F.2d at 915.

194. *Id.* at 917. Commentators have questioned the validity of this characterization. One has

the facts of the case, manipulated the posture of the litigation, and ignored established legal doctrine.

By vesting himself with the authority to manufacture and use these findings against Astilleros, Judge Posner engaged in a brand of judicial activism that threatens the integrity of the legal doctrines upon which his actions were based. The elements of those doctrines, as well as Judge Posner's disregard for them, will each be discussed separately. Further, the reasoning employed by Judge Posner reveals conflicts with other aspects of his jurisprudential scheme that also deserve comment.

A. Piercing Amoco's Corporate Veil

The act of piercing a corporation's veil is an established legal doctrine in Illinois. It consists, in part, of holding a corporation responsible for the obligations of its affiliate when the affiliate acts merely as its instrumentality.[195] This principle is usually applied in situations where a plaintiff seeks recovery from the parent of a subsidiary with whom the plaintiff has dealt.[196] In order to invoke this measure, Illinois courts have required the plaintiff to prove three elements: "[C]ontrol by the parent to such a degree that the subsidiary has become its mere instrumentality; fraud or wrong by the parent through its subsidiary; . . . and unjust loss or injury to the claimant."[197] In order to establish the existence of the requisite parental control, Illinois courts have provided claimants with a list of eleven factors,[198] each a separate

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written that a major flaw of the decision was that "the court[] fail[ed] to distinguish between actions of the defendant in the forum from which the claim arises and actions which form part of the relationship between the parties but which are not relevant to the dispute between them." Stewart, *Forum Non Conveniens: A Doctrine in Search of a Role,* 74 CALIF. L. REV. 1259, 1278 n.78 (1986). *See also* Note, *Specific and General Jurisdiction—The Reshuffling of Minimum Contacts Analysis,* 59 TUL. L. REV. 826, 840 n.74 (1985).

195. Steven v. Roscoe Turner Aeronautical Corp., 324 F.2d 157, 160 (7th Cir. 1963).

196. *E.g.,* CM Corp. v. Oberer Dev. Co., 631 F.2d 536 (7th Cir. 1980); Bernadin, Inc. v. Midland Oil Corp., 520 F.2d 771 (7th Cir. 1975); Allegheny Airlines, Inc. v. United States, 504 F.2d 104 (7th Cir. 1974), *cert. denied sub nom.,* Forth Corp. v. Allegheny Airlines, Inc., 421 U.S. 978 (1975).

The veil piercing doctrine is also applied in the field of personal jurisdiction. In this context, the plaintiff claims that the court's exercise of personal jurisdiction over a corporation renders a specified affiliate amenable to suit in that forum as well. Illinois courts and courts interpreting Illinois law have stated that personal jurisdiction over a parent or subsidiary does not equal personal jurisdiction over its affiliates without a showing that the corporations in question have not been kept sufficiently separate. In either the procedural or substantive context, moreover, the party invoking the veil piercing doctrine must meet the requirements of a general multi-factored test. For cases discussing the doctrine pursuant to jurisdictional claims, see Van Dorn Co. v. Future Chem. and Oil Corp., 753 F.2d 565 (7th Cir. 1985); Standard Telecommunications, Inc. v. American Telecommunications Corp., No. 86 C 4566 (N.D. Ill. December 12, 1986); and Main Bank of Chicago v. Baker, 86 Ill. 2d 188, 427 N.E.2d 94 (1981).

197. *Steven,* 324 F.2d at 160.

198. Factors generally considered by courts are: "(a) The parent corporation owns all or most of the capital stock of the subsidiary; (b) the parent and subsidiary corporations have

indicia of parental dominance. In order to prevail on its claim, the "piercing" party must show the presence of a substantial number of these factors.[199]

A critical step in the process of piercing a corporation's veil is, therefore, the element of proof. This element, in turn, produces two ancillary requirements. One is that in order for a court to apply this doctrine, a party must first present factual allegations that the opponent corporations are really one entity.[200] These allegations must then be submitted to the adversarial process. The implication of this requirement is that a corporation's veil cannot be pierced unless the lower court has first considered the matter. The Seventh Circuit itself has recognized this implication.[201]

The second requirement provides that the doctrine can only be used in a centrifugal manner. In other words, the nature of veil piercing (allegations, proof, etc.) dictates that a party can only direct it at an opponent and not at itself. For instance, this requirement has come into question in situations in which defendants have asked the court to pierce the corporation's veil so that the corporation and its affiliates will be treated as a solitary legal entity in order to limit their exposure to liability.[202]

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common directors or officers; (c) the parent corporation finances the subsidiary; (d) the parent corporation subscribes to all the capital stock of the subsidiary or otherwise causes its incorporation; (e) the subsidiary has grossly inadequate capital; (f) the parent corporation pays the salary or other expenses and losses of the subsidiary; (g) the parent corporation has substantially no business except with the parent corporation or no assets except those conveyed to it by the parent corporation; (h) in the papers of the parent corporation or in the statements of its officers, the subsidiary is described as a department or division of the parent corporation, or its business or financial responsibility is referred to as the parent corporation's own; (i) the parent corporation uses the property of the subsidiary as its own; (j) the directors or executives of the subsidiary do not act independently in the interest of the subsidiary but take their orders from the parent corporation; (k) the formal legal requirements of the subsidiary are not observed." *Steven,* 324 F.2d at 161.

199. *Id.* In evaluating the factors, the Illinois Supreme Court has emphasized the following four: 1) whether adequate corporate records have been kept; 2) whether funds have been commingled; 3) whether the subsidiary or affiliate is undercapitalized; and, 4) whether one of the corporations treats the assets of the other(s) as its own. Main Bank of Chicago v. Baker, 86 Ill. 2d 188, 204-05, 427 N.E.2d 94, 102 (1981).

200. *See, e.g.,* Standard Telecommunications, Inc. v. American Telecommunications Corp., No. 86 C 4566, slip op. at 4 (N.D. Ill. Dec. 12, 1986) ("In this case, plaintiff's complaint is completely devoid of any allegation that the two corporations—ATC and ATC-Canada—have failed to retain their separate identities. . . . Given the absence of any allegation that ATC is the mere 'alter-ego' of ATC-Canada, or any other allegation that would justify 'piercing the corporate veil' between the two entities, there is no basis for this court's assertion of jurisdiction over ATC-Canada based on the Illinois activities of its subsidiary."); Club Assistance Program, Inc. v. Zuckerman, 594 F. Supp. 341, 351 (N.D. Ill. 1984) ("[Plaintiff's] conclusory statement [that] Genesis is defendants' 'alter ego' is not sufficient. . . . Rules' notice pleading requires the allegation of facts, not mere legal conclusions.").

201. Hazeltine Research Inc. v. Zenith Radio Corp., 388 F.2d 25, 30 (7th Cir. 1976), *aff'd in part, and rev'd in part on other grounds,* Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100 (1969). The *Hazeltine* court stated: "The resolution of the alter ego issue can be made only after an adversary determination of the facts involved. This court cannot make an initial determination of these facts, and the district court did not do so." *Id.*

202. Such a request has occurred most often in the context of workers' compensation claims.

The underlying policy of this requirement prohibiting self-inflicted veil piercing is that a corporation must bear the responsibility for the corporate structure it establishes. By the same token, however, this policy also allows the same corporation to benefit from the protections provided by its structurings. Moreover, it is antithetical to this policy to assert that a corporation's veil should be pierced simply because the parent's only motive in creating a subsidiary was to limit liability. The whole purpose of the law of incorporation is to enable investors and enterprises to limit their liability through the appropriate use of corporate insulation.[203]

Judge Posner, however, disregarded these policy implications when he examined Amoco's corporate structure:

> Although Astilleros makes much of Amoco Tankers' place of incorporation, there do not appear to be any real Liberians in the picture—Liberian registry having been obtained no doubt for the *none too creditable purpose of avoiding liability,* rather than to conduct business in or from Liberia. The real purchaser of the Amoco Cadiz was Standard Oil (Indiana), whose headquarters is in Chicago.[204]

Implicit in this passage is the dubious assumption that Standard Oil lacked the sophistication to create a subsidiary which, at least on its face, would be able to meet the requirements of corporate separateness. Additionally, Judge Posner completely disregarded the tenets of the veil piercing doctrine:

For example, in McDaniel v. Johns-Manville Sales Corp., 487 F. Supp. 715, 716 (N.D. Ill. 1978), the defendant corporation and its subsidiaries requested the court to view them collectively as the plaintiff's employer so that the plaintiff would be limited to recovery under the Illinois Workers' Compensation Act. If they had been successful, the entities would thereby have limited their exposure to liability by virtue of the damage ceilings within the Act for "employers." *See* ILL. REV. STAT. ch. 48, para. 138.5 (1987).

Courts applying Illinois corporation law, however, have consistently denied such self-serving attempts by corporations to pierce their own veils. The *McDaniel* court summarized the Illinois position succinctly in denying the defendants' request in that case: "Defendants have uniformly been denied the opportunity to pierce their own veils in order to avoid liability." 482 F. Supp. at 716 (citations omitted).

203. *See, e.g., In re* Acushnet River and New Bedford Harbor Proceeding, 675 F. Supp. 22, 34 (D. Mass. 1987) (under federal pollution statutes, refusing to pierce corporate veil in order to subject foreign parent company to court's *in personam* jurisdiction). In response to the argument that a parent should answer for its subsidiary when that subsidiary was created merely for purposes of limiting liability, the *Acushnet River* court responded: "The argument is rather remarkable because it converts the very purpose for which the law enables investors to incorporate into an impermissible evil." *Id.* Similarly, two commentators have noted:

> [T]he very object of limited liability for corporations is to elevate form over substance. . . . Authoritative organs of state lawmaking, whether legislative or judicial, already have decided to rely on artificialities rather than realities in corporate law. . . . Corporations are legal fictions, created for the precise purpose of allowing individuals to separate themselves from liability created by their commercial enterprises.

Brilmayer & Paisley, *Personal Jurisdiction and Substantive Legal Relations: Corporations, Conspiracies, and Agency,* 74 CALIF. L. REV. 1, 32 (1986).

204. *In re Amoco Cadiz,* 699 F.2d 909, 914 (7th Cir. 1983) (emphasis added).

that it be invoked by one party against that party's opponent; that it be considered in the lower court; and that the requisite parental control be proven. Further, in light of the tangled factual pattern which Judge Posner faced, a detailed explanation as to why, in some instances, a corporation may pierce its own veil was in order—not a conclusory statement that there "do not appear to be any real Liberians" involved in the case.[205]

Much of Judge Posner's justification for his decision to pierce Amoco's veil came from the fact that the French had, in a procedural sense, already done so. However, by using the de facto action of the French to support his decision to repierce the Amoco veil, Judge Posner merged the substantive finding of corporate unity with the procedural right of third-party indemnification.

Although the French plaintiffs pierced Amoco's veil by suing AIOC and Standard Oil, parties other than the ship's owner, the "pierced" parties did not contest such an action. By allowing the French to bring suit against them, the Amoco parties had admittedly forfeited their right to require the French to submit such a claim to the adversarial process. However, as defendants to claims for the recovery of property damage, the Amoco parties were entitled to the procedural right that their positions afforded: the right to seek indemnity or contribution.[206]

This procedural right, however, is completely separate from the substantive determination that the parties involved should be treated as a solitary legal entity. In other words, the mere fact that Standard Oil and AIOC permitted the French to bring an action against them did not automatically confer the privilege on these parties to sue Astilleros in the character of the contract signatory. Such a self-contained, centripetal piercing is not permissible.

Moreover, despite the fact that Amoco allowed the French to pierce its veil, the Amoco parties never contended that they should be treated as a single legal entity. Rather, each of the Amoco parties cross-claimed and brought a third-party claim against Astilleros as a separate corporation.[207] In addition, when Judge McGarr dismissed AIOC and Standard Oil from the limitation complaint on the grounds that neither was the owner of the Amoco Cadiz, none of the parties appealed that decision.[208]

The veil piercing in the *In re Amoco Cadiz* dispute, therefore, took on two separate forms: 1) the procedural right of a defendant to bring an indemnity claim;[209] and, 2) the substantive determination that the corpora-

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205. *See supra* notes 192 & 196 (discussing complexities of determining whether veil piercing is appropriate and dangers of conclusory analyses in making determination).

206. FED. R. CIV. P. 14(a).

207. *See supra* part II (discussing *In re Amoco Cadiz* case facts).

208. *See id.*

209. A court must have an independent basis of personal jurisdiction over a third-party defendant before it can adjudicate a third-party claim. *See* J. FRIEDENTHAL, M. KANE, & A. MILLER, CIVIL PROCEDURE § 6.9 (1985): "[I]t should be kept in mind that a court must obtain personal jurisdiction over a third-party defendant before it can proceed to adjudicate the third-party claim."

tion and its subsidiaries actually constitute a single entity. While the former point was assumed by all parties involved, the latter claim, in whole or in part, was never raised. In light of this distinction, Judge Posner's conclusion that the Amoco parties should be treated as a unit was misplaced:

> [T]he effort [by Standard Oil to oppose the piercing of its veil] apparently failed; Standard Oil is a defendant in this litigation. If the plaintiffs can pierce Standard Oil's corporate veil to get at it directly, we cannot see why Standard Oil should not be able to pierce its own veil and get at Astilleros.[210]

Noticeably absent from Posner's reasoning was a citation to any authority in support of its conclusion that a judge, without solicitation, may pierce the veil of a party to the dispute. On the other hand, noticeably present in the analysis was a distortion of fact, law, and case posture. By stating that Standard Oil's effort "failed," Judge Posner misrepresented the fact that Standard Oil did not contest the suit brought against it by the French. In addition, Judge Posner distorted the law by transforming Standard Oil's legitimate procedural right to sue in indemnity into the substantive decision that Standard Oil and its subsidiaries were really only one party. And finally, by making this determination in the absence of litigation on the subject, Judge Posner disregarded the disposition of the case and the requirements of Illinois case law. As will be shown, the purpose of these contrivances was to simplify the case's factual composition which, in its more manageable form, permitted the full application of Judge Posner's own legal theories.

B. Transforming Amoco's Tort Claim Into One Of Quasi-Contract

The crux of Judge Posner's findings was that the many Amoco cross-party and third-party claims could be consolidated into a single action in indemnity, brought by an Illinois resident against a nonresident with whom it had contracted in Chicago.[211] In holding that this claim for indemnity "arose from" the contract, Judge Posner had to contend with three obstacles: 1) the specific contract provision that any disputes between the parties "arising under or by virtue of" the contract were to be resolved in London;[212] 2) the fact that Amoco's claim was in tort, not contract; and, 3) the statement in the contract that Astilleros would not be liable for any consequential damages due to defects in the ship's design and manufacture.[213]

Judge Posner began his analysis by noting that the arbitration clause had not been invoked. He speculated that perhaps it was not operative because Amoco Tankers was not the other party to this dispute.[214] He then dismissed

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210. *In re Amoco Cadiz*, 699 F.2d 909, 914-15 (7th Cir. 1983).

211. Wrote Judge Posner: "To negotiate and then sign a contract in the purchaser's domicile is to transact business there in a substantial sense, thus satisfying the first requirement of 17(1)(a)." *Id.* at 915.

212. *Amoco Cadiz Contract, supra* note 24, at Art. XIII, para. 2.

213. *Id.* at Art. IX, para. 3.

214. 699 F.2d at 915.

the relevance of the arbitration clause altogether by stating that "[t]he issue under the statute is jurisdiction rather than Astilleros' contract rights."[215]

This line of reasoning, however, reflects a disingenuousness with respect to the facts of the case. The question of why the arbitration clause was not invoked should not have been a matter of speculation. It was not triggered because none of the Amoco claimants asserted that they were suing as parties to the contract. Astilleros had no reason to call the arbitration clause into operation; the claim was one in tort brought by parties who were not contract signatories.

Moreover, if the indemnity claim 'arose from' the contract for long-arm jurisdiction purposes—as Judge Posner clearly thought it did—it would be difficult to imagine why it did not equally implicate the arbitration clause, which was to govern all claims that "ar[o]se under or by virtue of the contract."[216] Judge Posner, however, avoided this potential conflict by making the above distinction between the issues of jurisdiction and Astilleros' contract rights.[217] But this distinction is itself contradictory, for Judge Posner premised the exercise of jurisdiction on the finding that the contract, out of which Astilleros' contract rights sprung, constituted the heart of the relationship between the parties to the litigation. Jurisdiction, in other words, was predicated on the fact that such a contract between the parties existed. Judge Posner thus was able to uphold jurisdiction only by joining these two issues; yet he based his analysis on the assertion that they be viewed separately.

Allowing such a distinction to speak for itself, Judge Posner then proceeded to examine the nature of the claim. He reasoned that had the parties foreseen the spill they would have expressly provided for indemnity. Posner, therefore, found that this action for negligent design and manufacture was not really one in tort at all but, rather, was a claim in quasi-contract.[218]

This characterization of the claim is yet another illustration of Judge Posner's tendency to distort the facts and the law. In the first place, Illinois case law does not hold that an indemnity claim between parties with a preexisting contractual relationship is an action in quasi-contract. As the Seventh Circuit itself had noted, "it has long been recognized that an indemnitee, where he seeks to recover damages paid for injuries caused by the negligent or wrongful act of the indemnitor, may proceed by action *ex delicto,* as by an action on the case—a tort action."[219]

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215. *Id.*

216. *Amoco Cadiz Contract, supra* note 24, at Art. XIII, para. 2.

217. 699 F.2d at 915.

218. *Id.*

> [T]he parties have a preexisting contractual relationship and the suit asks the court to find in effect that they would have provided expressly for indemnity had they foreseen the incident that has given rise to the indemnity claim.

Id.

219. Beetler v. Zotos, 388 F.2d 243, 245 (7th Cir. 1967). The *Beetler* court also wrote: "Thus,

Secondly, the two United States Supreme Court cases cited by Judge Posner do not stand for the proposition that maritime indemnity actions permit the court to read into a contract an indemnity clause when the contract contains no language to that effect.[220] In both cases, the issue concerned whether the owner of a ship could seek indemnity against a stevedoring contractor. In each case, the shipowner had paid compensation damages to one of the contractor's workmen who was injured while unloading the ship in question. Though the contracts between the shipowners and contractors did not have express indemnity clauses, they did have language requiring that the work be performed "with reasonable safety" or to similar effect.[221] The Court then read into the language of the contracts themselves agreements to indemnify, should a workman be injured by virtue of the contractor's negligence. Thus, in finding these indemnity agreements between the owner and contractor, the Court looked to the actual language of the contracts. It did not engage in any speculative reasoning to determine

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in [prior Illinois] actions seeking indemnification for monies paid on a judgment resulting from the negligent act of the person sued as indemnitor, the declaration was in case, a tort action, rather than in assumpsit, a contract action." *Id.* at 245-46.

Judge Posner's sudden recharacterization of this indemnity claim from tort to quasi-contract, along with its subsequent acceptance by the courts, contains traces of an Orwellian transition. *Compare* Otis Clapp and Son, Inc., v. Filmore Vitamin, No. 78 Civ. 3451, slip op. at 24-25 (1981) ("[In] *In re Oil Spill by Amoco Cadiz,* 491 F. Supp. 170, . . . the subject matter of plaintiff's tort action for the negligent manufacture of ship parts was identical to the subject matter of its business activity in Illinois."); and John Walker and Sons Ltd. v. De Mert & Dougherty, Inc., 821 F.2d 399, 403 (7th Cir. 1987) ("In *In re Oil Spill of Amoco Cadiz,* 699 F.2d 909 . . . we held that a *quasi-contractual indemnity* action for damages caused by an oil spill in Europe satisfied the 'arising from' requirement where the contract to build the ship which caused the spill had been negotiated in Illinois.") (emphasis added) *with* G. ORWELL, 1984, 148-49 (1949).

> On the sixth day of hate week . . . when . . . the general hatred of Eurasia had boiled up into such delirium that if the crowd could have got their hands on the two thousand Eurasian war criminals who were to be publicly hanged . . . they would unquestionably have torn them to pieces—at just this moment it had been announced that Oceania was not after all at war with Eurasia. Oceania was at war with Eastasia. Eurasia was an ally.
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> There was, of course, no admission that any change had taken place. Merely it became known, with extreme suddenness and everywhere at once, that Eastasia and not Eurasia was the enemy.

G. ORWELL, 1984, 148-49.

220. Weyerhaeuser S.S. Co. v. Nacirema Operating Co., 355 U.S. 563 (1958); Ryan Stevedoring Co. v. Pan-Atlantic S.S. Corp., 350 U.S. 124 (1956). In *Ryan,* the Court read the contract provision requiring that the stevedoring company perform its work "in a reasonably safe manner," to include an obligation to indemnify the shipowner in the event of injury to a workman by virtue of the contractor's negligence. "This obligation," wrote the Court, "is not a quasi-contractual obligation implied in law . . . ." 350 U.S. at 133.

In *Weyerhaeuser,* the Court reaffirmed its holding in *Ryan,* asserting that language in the contract "to faithfully furnish . . . stevedoring services" constituted a constructive indemnity provision. 355 U.S. at 567.

221. *Ryan,* 350 U.S. at 133. In *Weyerhaeuser,* the language "to faithfully furnish . . . stevedoring services" was included in the contract. 355 U.S. at 567.

how the parties would have allocated the burden had they foreseen the accident.

Notwithstanding the above, Judge Posner stated that a court may read an indemnity clause into the contract even in the absence of language which indicates such a provision. He based his interpretation on the assumption that non-contract indemnity claims, in effect, "ask the court to find"[222] that the parties would have provided for indemnity had they foreseen the disaster.[223] This construction of the law is nothing more than a self-ordained invitation to displace the intent of the parties with the discretion of the judge.

In this particular case, moreover, Judge Posner's exercise of discretion went beyond intention displacement into the realm of contract deconstruction. Judge Posner hypothesized that had the parties foreseen the disaster, they would "have inserted an explicit provision for Astilleros to indemnify Amoco in the event that disaster struck, Amoco was sued, and judgment was entered against it."[224] He based this hypothesis on the rationale that Astilleros was in the position to avoid the disaster at the "lowest possible cost,"[225] and would therefore have consented to the provision.

This conjectural analysis, however, lies in direct conflict with the facts of the case. Though the parties to the contract did not foresee this specific disaster, they did agree that Amoco Tankers would bear the risk of consequential damages arising from defects in the design and manufacture of the ship.[226] In light of this contract provision, Judge Posner's analysis asserts that the allocation of certain risks by contracting parties is immaterial when such allocation conflicts with the paternalistic notions of the decisionmaker.[227]

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222. 699 F.2d at 915.

223. This assumption rests on the paternalistic foundation that these two multi-million dollar enterprises require the eventual assistance of the court to compensate for their myopia and lack of thoroughness when negotiating a contract. Such an assumption reduces these sophisticated parties to partners in a "handshake" agreement in which they both implicitly rely on the discretion of the judge to reconcile difficulties which arise from unforeseen occurrences. Such an assumption is as counter-factual as it is misguided.

224. 699 F.2d at 915.

225. *Id.*

226. *Amoco Cadiz Contract, supra* note 24, at Art. IX, para. 3.

227. Judge Posner himself has decried this lopsided form of contract construction:

> [W]hile many limitations on freedom of contract may be consistent with even the strongest conception of individual autonomy, at least one class of limitations is not. These are limitations which may be called paternalistic. As we use the term, a limitation on an individual's freedom of contract is paternalistic if the sole justification for imposing it is to promote or protect the individual's own welfare.

R. POSNER & A. KRONMAN, THE ECONOMICS OF CONTRACT LAW 254 (1979).

Although Judge Posner arguably interpreted the contract as such in order to promote the interests of judicial economy as opposed to those of Amoco *per se, see infra* part V and notes 245-52, the ultimate effect was that Judge Posner allowed Amoco to sue on its contract while at the same time protecting it from the contract's adverse choice-of-law and forum selection provisions. In another section of the opinion, moreover, Judge Posner displayed his paternalistic

It is also worthy of notice that, unlike the other two obstacles which Judge Posner faced—the arbitration clause and the Amoco parties' characterization of their claims as actions in tort—he could not refute this obstacle with the use of specious distinctions or suspect recharacterizations. Rather, he circumvented this factual conflict by the only route left open to him: he simply ignored this contract provision altogether.[228]

Judge Posner found that the indemnity claim, while not strictly contractual, was nevertheless of a sufficiently contractual nature to satisfy the "arising from" requirement of section 17(1)(a).[229] Consequently, "Astilleros [could] not argue surprise at having to defend a suit arising from a contract negotiated and signed in Illinois with an Illinois enterprise. . . . [Furthermore, Astilleros] had . . . a sufficient presence within Illinois to satisfy the territorial notions that *Volkswagen* brought back into due process analysis of personal jurisdiction."[230] Thus, for Judge Posner, there was no violation of due process.

Such a reading of the due process clause again demonstrates how Judge Posner subverted the prevailing legal standards of the day to those of his own. As discussed in part III(C), the "territorial notions" brought back by *Volkswagen* were taken away shortly thereafter by the *Insurance Corp. of Ireland* decision. The defendant's individual liberty interest replaced state sovereignty as the guiding principle to due process analysis. However, As-

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view of Amoco by treating it as a "favored-son" of Illinois, who should not be punished on account of his harmless mischief. "We doubt that Illinois would want to withdraw its laws from a major Illinois enterprise merely because the enterprise had created a Liberian shell in an effort (if that is what it was) to keep some of its assets out of the reach of potential creditors unlikely to be Illinois residents." 699 F.2d at 914.

228. Judge Posner never made mention of this contract provision.

229. 699 F.2d at 915. Judge Posner had a difficult time placing Amoco's alternative claim for contribution into his theory; for it was antithetical to his principle of lowest cost avoidance that the parties would distribute the indemnity risk on a pro rata basis (i.e., how could two parties both be the lowest cost avoider?). Judge Posner resolved this theoretical conflict by characterizing the contribution claim as only ancillary to the indemnity action. "But where as in this case it [contribution] is sought merely as a fallback to a claim for quasi-contractual indemnity, we consider it sufficiently related to the contract giving rise to the indemnity claim also to be within the reach of the Illinois long-arm statute." *Id.*

This reasoning, however, is contradictory, for although contribution is an adjunct claim to indemnity, it was nevertheless an inseparable part of the whole action brought by Amoco. In other words, by characterizing Amoco's action to obtain remuneration as contractual, Judge Posner was labelling each of the claim's component parts as contractual as well. However, the contribution prong of this action did not fit into Judge Posner's theory of contractual indemnity. If it did, Judge Posner would have had to admit, that had the parties foreseen the accident, Astilleros would have agreed to shoulder, say, 60%, because that was the percentage of the negligence for which it envisioned itself accountable. By not conforming to the theory's rationale, the contribution component of Amoco's action thereby defeated the theory's application, it did not modify it; for the claim did not seek "quasi-contractual indemnity," which assumes rigid risk allocations, but rather indemnity or contribution, which is premised on the flexible standards of comparative negligence.

230. 699 F.2d at 916.

tilleros' interest in not having to litigate a dispute in a foreign state received only scant attention.[231]

Also, Judge Posner's imputation of foreseeability to Astilleros was equally suspect. The parties to the contract had specifically provided that any contractual disputes between them would be resolved in England, under English law. Judge Posner was, therefore, confronted with a conflict which the *World-Wide* Court did not address: how to weigh a defendant's contacts when that defendant purposefully availed himself of conducting business in the forum state, yet does not reasonably anticipate suit there.[232]

Judge Posner ignored this conflict, however, by stating that litigation in Chicago should have been within the contemplation of both parties to the contract. This disregard for the will of the parties conflicted with *World-Wide's* policy statement that the due process clause should lend "a degree of predictability to the legal system"[233] such that commercial actors could structure their conduct in order to avoid suits in particular forums. According to Judge Posner's analysis, however, this "degree of predictability" was subordinate to the clause's allowance for judicial discretion: a component of the clause which permits the individual outlook of the judge not only to displace a consideration of the competing jurisdictional factors, but also to override the express will of the parties.

C. Bootstrapping The Jurisdictionally Deficient French Claims On To Amoco's

Notwithstanding the above examples, Judge Posner's activist crusade reached its peak when he addressed the French claimants' action against Astilleros. Unlike the contract's consequential damages provision, Judge Posner could not disregard the facts that the French claim was unalterably an action in tort; that the conduct complained of took place in Spain; that the plaintiffs were from France; that the injury occurred in France; and that the parties to the dispute had never transacted business with one another.

Indeed, Judge Posner acknowledged that the French action was nothing more than a product liability suit. He also admitted that, unlike typical product liability actions, the plaintiffs in the case at bar were not in the chain of title to the ship. Furthermore, although he did not refer to it, Judge Posner was also constrained by the Illinois Supreme Court's language in *Green v. Advance Ross Electronics Corp.*:[234] "[W]e must give heed to the injunction of the [long-arm] statute that where, as in *Gray,* all of the conduct complained of took place outside of Illinois, at least the injury must have been suffered in Illinois."[235]

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231. *See infra* note 238 (discussing Judge Posner's consideration of Astilleros' liberty interests to the extent he did so).

232. *See supra* note 41.

233. 444 U.S. 286, 297 (1980).

234. 86 Ill. 2d 431, 427 N.E.2d 1203 (1981).

235. *Id.* at 438, 427 N.E.2d at 1207.

In spite of these prohibitive constraints, however, Judge Posner found that jurisdiction could be asserted. He based this decision on the combination of an expansive reading of the "arising from" clause with an infusion of the notion of "practical virtue" into the statute. Yet, even Judge Posner himself appeared to wince at this strained interpretation:

> [T]he negotiation and signing of the contract were critical steps in the chain of events that led to the oil spill. So *there is a sense* in which the spill and resulting damage may be said to arise from the transaction of business in Illinois between Amoco and Astilleros; and if this conclusion is not compelled by, it is at least consistent with the statutory language and has the *practical virtue* of allowing all claims arising out of a catastrophe to be litigated at the same time in the same court.[236]

Judge Posner's appeal to the "practical virtue"[237] of claim consolidation produced two unwarranted results. First, as in Judge McGarr's analysis, Judge Posner abrogated the limitations once contained within 17(1)(a)'s "arising from" requirement. By characterizing the 1970 contract negotiations as "critical steps" in the process which led to an oil spill eight years later off the French coast, Judge Posner engrafted a malleable variation of the "but for" test onto 17(1)(a).[238] This malleable standard now licenses judges to read any notion of historical causation they wish into the provision.

Second, the claim-consolidation principle permitted Judge Posner to use the jurisdictional basis of the Amoco cross-claim to provide the jurisdictional foundation for the primary claim of the French. He reasoned: "[I]f negotiating and signing the contract in Illinois subjected Astilleros to Illinois' limited sovereignty for purposes of the Amoco parties' cross-claim, they

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236. 699 F.2d at 917 (emphasis added).

237. The exploitation of convenience and economy—the underpinnings of "practical virtue"—to uphold jurisdiction where it otherwise would not stand, has been explicitly rejected by the Illinois Supreme Court. "But no matter how much more convenient and economical it may be to adjudicate defendants' . . . claim against [a third-party defendant] in the same action in Illinois, the [third-party defendant] cannot be brought under the authority of Illinois courts unless the result is [itself] warranted." *Green,* 86 Ill. 2d at 440, 427 N.E.2d at 1208.

238. The danger of a jurisdictional standard which permits jurisdiction to be asserted when the cause of action "in a sense" "arises from" defendant's contacts is that it contains no inherent limitations. Though writing in the context of substantive law, Professor Prosser decried such schemes which permitted the unrestrained application of factual causation: "In a philosophical sense, the consequences of an act go forward to eternity, and the causes of an event go back to the discovery of America and beyond. . . . Some boundary must be set to liability for the consequences of any act, upon the basis of some social idea of justice or policy." W. PROSSER, HANDBOOK ON THE LAW OF TORTS 236-37 (4th ed. 1971).

The "social idea of justice" which governs jurisdictional analyses is primarily the individual liberty of the defendant. *See* Insurance Corp. of Ireland v. Compaigne des Bauxites de Guinee, 456 U.S. 694, 702 (1982). This interest was dismissed with respect to the French claim because, according to Judge Posner, Astilleros had already submitted itself to Illinois' limited sovereignty by virtue of the Amoco claim. Astilleros' liberty interest was given only scant attention with respect to Amoco's claim, though, because Astilleros should have foreseen litigation in Illinois, arbitration clause notwithstanding. The individual liberty interest of Astilleros was therefore supplanted by considerations of judicial economy and conjectural behavior.

likewise subjected it to Illinois' sovereignty for purposes of the [French] complaint."[239]

The implication of this reasoning is that an action which is not jurisdictionally sufficient with respect to one defendant in a group of many, may become proper when a jurisdictionally valid cross-claim is brought against that defendant. Therefore, so long as there is an action, whether principal or ancillary, which brings a defendant within the state's jurisdictional domain, this theory permits any other related claim to look to the jurisdictionally sufficient action for foundation. This theory contains two flaws of its own: 1) it assumes that due process analysis is based on "the legitimate exercise of sovereign power," an assumption that was discredited the year before *In re Amoco Cadiz* in *Insurance Corp. of Ireland;*[240] and, 2) it is premised on the erroneous notion that a jurisdictionally valid claim by the principal plaintiff is not a prerequisite to bringing a jurisdictionally valid cross-claim against a co-defendant.

Judge Posner's exploitation of this notion, as well as its inherent inconsistencies, can be observed by examining the order by which Judge Posner considered Astilleros' appeals. Although Judge Posner himself observed that the Amoco cross-claims "will lie only against an existing defendant," he first reviewed the sufficiency of the Amoco parties' claims. This order of review is obviously backwards, as a defendant is not an "existing" defendant until the principal claim against him is shown to be jurisdictionally sufficient.[241] In other words, a defendant cannot bring a cross-claim unless there is a co-defendant to direct it against; and whether this co-defendant exists is a question of whether he is amenable to jurisdiction under the principal plaintiff's claim. The cross-claim device, then, by its nature provides that both parties to it have been found amenable to the primary suit.

Judge Posner disregarded this qualification in order to serve the demands of "judicial economy." "[O]nce Chicago is conceded to be a reasonable site for the French plaintiff's suit against Amoco and for Amoco's suit against Astilleros, considerations of judicial economy[242] make it a reasonable site

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239. 699 F.2d at 917.

240. *See supra* part III(C) (discussing Supreme Court's due process developments in the personal jurisdiction area in detail).

241. In Judge Posner's defense, it could be argued that he followed this order of review because he first wanted to address the jurisdictional sufficiency of the Amoco parties' third-party claims against Astilleros. However, throughout his opinion he referred to the Amoco claims as cross-claims. Moreover, at the outset of his opinion, he stated that Amoco had brought its third-party claim pursuant to Rule 14(c) of the Federal Rules of Civil Procedure. This provision allows the principal plaintiffs to recover directly from the third-party defendant. Further in the opinion, Judge Posner stated that these 14(c) claims were "of no consequence," because the French had already filed a complaint against Astilleros as a direct defendant. It therefore appears that, in light of the French plaintiffs' direct action and Amoco's 14(c) third-party claim, the jurisdictional sufficiency of the French action against Astilleros should have been determined first.

242. *But see* J. Friedenthal, M. Kane, & A. Miller, *supra* note 209, at § 2.14 ("The desire to achieve judicial economy cannot obviate the need to assure that the forum chosen comports with the due process rights of the defending party.").

for the French plaintiffs' suit against Astilleros as well."[243] Perhaps not surprisingly, Judge Posner failed to cite a single case, Illinois or otherwise, to support this bootstrapping exercise.[244] Rather, its justification rested solely on the preemptive grounds of "judicial economy" and "practical virtue." Judge Posner's activist crusade ended, therefore, with the elevation of these talismanic principles to permissible standards of due process.

V. Conclusion: The Irony Of Judge Posner's Jurisprudence

Through the principle of judicial economy, Judge Posner circumvented a full-scale jurisdictional analysis of the dispute before him. However, by avoiding the task of reconciling the tensions embodied within the prevailing jurisdictional calculus, Judge Posner produced tensions within his own jurisprudential scheme. At the heart of these tensions lay the question of what role the discretionary factor of judicial economy should play in a jurisdictional analysis.

As mentioned in part I, Judge Posner has written that, in light of the caseload crisis which besets the federal courts, judges may include the factor of judicial economy in their decisional balance when "the answer is not dictated by precedent."[245] Moreover, he has referred to the field of jurisdiction as an area "where judicial economy is an accepted factor in judicial decision making."[246] Yet, despite its usefulness, Judge Posner has recognized that this principle is nonetheless a discretionary consideration, and hence subordinate to precedent. "It is only when the springs of authoritative guidance run dry that the judge enters the area of legitimate judicial discretion."[247]

The jurisprudential question for Judge Posner in the *In re Amoco Cadiz* litigation was, therefore, whether any "authoritative guidance" existed to direct him. As indicated by his decisions to pierce the Amoco parties' veil, to transform their tort claim into a contract action, and to bootstrap the French actions onto their cross-claims, he apparently thought not. But, as

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243. 699 F.2d at 917.

244. For a decision directly in conflict with this line of reasoning, see Carty v. Beech Aircraft Corp., 679 F.2d 1051 (3d Cir. 1982). In *Carty*, personal representatives of passengers who died in a plane crash brought an action against the airline service, the manufacturer of the plane, and the manufacturer of the plane's engine. The airline service cross-claimed against both manufacturers. Though the court had jurisdiction over plaintiffs' claim against the air service, as well as the air service's claim against the manufacturers, it denied plaintiffs' actions against the manufacturers for lack of personal jurisdiction. Wrote the Third Circuit: "The statutory language precludes bootstrapping [plaintiffs'] claims onto those of cross-claimant, since it provides for the exercise of jurisdiction 'as to any claim for relief arising from [defendant's causation of] . . . injury in this territory.'" *Id.* at 1063.

245. R. Posner, The Federal Courts: Crisis and Reform 208 (1985). For an earlier exposition of Judge Posner's views on the proper modes of judicial decision making, see Posner, *The Meaning of Judicial Self-Restraint*, 59 Ind. L.J. 1 (1983).

246. R. Posner, *supra* note 245, at 208.

247. *Id.* at 206.

this Article has ventured to show, ample authority did exist with respect to each of these issues. Moreover, the applicable authority would have prohibited each of these three contrivances.

Judge Posner, consequently, disregarded the flowing "springs of authoritative guidance" in order to articulate his own doctrine; a doctrine grounded on the principle of judicial economy. Ironically, in other writings, Judge Posner has justified the use of this principle on the basis that it safeguards courts from degradation by limiting the number of their "performances": "The principal administrative cost that concerns federal courts dealing with jurisdictional . . . issues is the degradation in their own performance . . . from having to entertain too many cases. This is the concern underlying the frequent references in judicial opinions to considerations of 'judicial economy.'"[248] The irony, therefore, springs from the notion that the principle of judicial economy is intended to protect courts from degradation, yet Judge Posner had to degrade his analysis in *In re Amoco Cadiz* in order to invoke it.

As this Article has asserted, this degradation took the form of judicial activism. However, it should be noted that, under Judge Posner's rubric, this conduct would not be labelled as such. For Judge Posner, "judicial activism" in the strict sense refers only to usurpations of power by the judiciary from the other two branches of government;[249] for example, when the court acts as the legislature. With respect to the activity in question here, Judge Posner would term it either "judicial intrusiveness,"[250] if it supplanted the will of the parties with the will of the judge; or a lack of "judicial self-discipline,"[251] if it did not duly submit to the will of prior authority.

Regardless of the label imposed on Judge Posner's conduct, it still stands as an illustration of an unwarranted exercise of judicial power. Furthermore, regardless of whether this exercise was intended to diminish the court's docket, its lasting effect will be to license the extension of such spurious power in the future. Again ironically, such a result will tend to increase the court's caseload rather than to decrease it. Judge Posner himself has recognized this phenomenon.

> [B]old, self-confident judges are apt to write broader opinions than timid, insecure ones. And broad opinions . . . *enhance the power of the judiciary,* for they signify that the same number of cases will create more law than if judges wrote narrow opinions, sticking close to the facts of each case.[252]

Through the application of the restrictive principle of judicial economy and the measures based on it, Judge Posner thus crafted a doctrine far more expansive than the result ultimately obtained. Though the *In re Amoco Cadiz*

248. *Id.* at 307.
249. *Id.* at 211.
250. *Id.*
251. *Id.* at 220.
252. *Id.* at 216 (emphasis added).

dispute did finally reach the haven of claim consolidation, it left in its wake the devices of unsolicited veil piercing, claim transformation, and procedural bootstrapping. The *In re Amoco Cadiz* doctrine, at its foundations, therefore, represents the triumph of judicial contrivance: where the metaphors of "veils" and "wakes" displace method and where judicial discretion displaces authority.